COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

File Copy

Santa Fe, New Mexico
June 18-19, 1998

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 18-19, 1998

1. Opening Remarks of the Chair

   - Announcement of New Chair
   - Report on Actions Taken at the Judicial Conference Session
   - Standing Committee Report to the Judicial Conference
   - Executive Committee's Request to Explore Shortening Rulemaking Process

2. **ACTION** — Approval of Minutes

3. Report of the Administrative Office

   A. Pending legislation affecting rules

   B. Administrative action

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

   - Minutes and other informational items

6. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Proposed amendments to Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 for approval and transmission to the Judicial Conference

   B. **ACTION** — *(Litigation Package)* Proposed amendments to Rules 1006, 1007, 1014, 1017, 2001, 2004, 2007, 2014, 2016, 3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001, 6004, 6006, 6007, 9006, 9013, 9014, 9017, 9021, and 9034 for public comment

   C. **ACTION** — Proposed amendments to Rules 1007, 1017, 2002, 4003, 4004, and 5003 for public comment

   D. **ACTION** — Proposed amendments to Forms 1 and 7 for public comment

   E. **ACTION** — Rules-related recommendations in the National Bankruptcy Commission's report

   F. Minutes and other informational items

7. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Proposed amendments to Rules 5, 14, 26, 30, 34, and 37, and to Rules B, C, and E of the Supplemental Rules for Certain Admiralty and Maritime Claims for public comment (Proposed amendments to Rule 14 and Admiralty Rules B, C, and E approved at earlier meeting)

   B. Report on Mass Torts Working Group (Oral report)

   C. Minutes and other informational items

8. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** — Proposed amendments to Rules 6, 7, 11, 24, 31, 32, 38, 54, and a new Rule 32.2 for approval and transmission to the Judicial Conference

   B. Minutes and other informational items

9. Report of the Advisory Committee on Evidence Rules

   A. **ACTION**— Proposed amendments to Rules 103, 404, 701, 702, 703, 803, and 902 for public comment (Proposed amendments to Rules 103, 404, 803, and 902 approved at earlier meeting)

   B. Minutes and other informational items

10. Status Report on Proposed Rules Governing Attorney Conduct

11. Report of the Style Subcommittee (Oral report)

12. Report of the Technology Subcommittee

13. Old Business (Oral report)

14. Next Committee Meeting: New Orleans? January 14-15, 1998

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Judge A. Jay Cristol (Bankruptcy)
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Item 1

Agenda F-18 (Summary)
Rules
March 1998

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

Oppose H.R. 1536 (105th Congress), which would reduce the size of a grand jury . . . pp. 5-6

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

- Federal Rules of Appellate Procedure . . . . . p. 2
- Federal Rules of Bankruptcy Procedure . . . . . pp. 2-3
- Federal Rules of Civil Procedure . . . . . pp. 3-5
- Federal Rules of Criminal Procedure . . . . . pp. 5-8
- Federal Rules of Evidence . . . . . pp. 8-10
- Rules Governing Attorney Conduct . . . . . p. 10

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

Agenda F-18
Rules
March 1998

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on January 8-9, 1998. All the members attended the meeting, except Patrick F. McCartan. The Department of Justice was represented by Eileen C. Mayer, Associate Deputy Attorney General.

Representing the advisory rules committees were: Judge Will L. Garwood, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Fern M. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro, deputy chief of the Administrative Office's Rules Committee Support Office; Thomas E. Willging of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee.

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules determined that — barring an emergency — no amendment to the rules will be forwarded until the comprehensive revision of the appellate rules have been in effect for some time. The restyled appellate rules are now before the Supreme Court for its consideration. If approved by the Court and not modified by Congress, they will take effect on December 1, 1998.

At its September 1997 meeting, the advisory committee considered the many proposals for rules amendments remaining on its agenda. It rejected or declined to take action on a good number of suggestions, and it prioritized the remaining suggestions for future consideration. In particular, the advisory committee is considering the possibility of developing uniform rules governing unpublished opinions, including their precedential effect, if any, and related matters. The Committee on Court Administration and Case Management, which is studying the long-range planning aspects of uniformity in this area, has been alerted to the advisory committee's plans.

The advisory committee presented no items for the Committee's action.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented no items for the Committee's action.

The advisory committee is reviewing comments submitted on a preliminary draft of proposed amendments to 16 bankruptcy rules published in August 1997 for public comment. It is also working on proposed amendments to Rules 9013 and 9014, which deal with litigation procedures. The proposed changes would substantially revise and improve the rules governing litigation in bankruptcy cases, other than in adversary proceedings. The advisory committee is

also considering the rules-related recommendations contained in the report of the National Bankruptcy Review Commission to Congress.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Rules B, C, and E of the Supplemental Rules for Certain Admiralty and Maritime Claims and conforming amendments to Rule 14 of the Federal Rules of Civil Procedure and recommended that they be published for public comment.

Rule B (In Personam Actions: Attachment and Garnishment) would be amended to reduce the need for service of admiralty and maritime attachment by a United States marshal. Other changes conform to 1993 amendments of Civil Rule 4. State law quasi-in-rem jurisdiction would not be borrowed for admiralty proceedings, but Rule B would expressly confirm the availability of state security remedies through Civil Rule 64.

Rule C (In Rem Actions: Special Provisions), which governs true in rem proceedings, has been invoked for civil forfeiture proceedings by a growing number of statutes. As the forfeiture practice has grown, it has become apparent that some distinctions should be made between admiralty and forfeiture proceedings. The proposed changes would allow a longer time to appear in a forfeiture proceeding than in an admiralty proceeding. They also would establish some distinctions in the procedures for asserting interests in the property brought before the court.

Rule C and Rule E (Actions in Rem and Quasi in Rem: General Provisions) would be amended to reflect statutory provisions that allow a forfeiture proceeding to be brought in a district in which the property is not located. Other changes would be made in various parts of Rule E.

Civil Rule 14 (Third-Party Practice) would be amended to reflect changes in the language of Supplemental Rule C(6).

The Committee voted to publish the proposed amendments for comment by the bench and bar at the regularly scheduled time.

Scope and Nature of Discovery

The advisory committee sponsored a major symposium on discovery reform at the Boston College School of Law in September 1997. Several panels of experienced practitioners, judges, and academics addressed distinct discovery issues, and representatives from major national bar organizations submitted papers on proposed discovery reform. In general, the consensus of the symposium's participants was that the discovery process was working well in most cases. But many complaints were expressed about the operation of the discovery rules in cases that seemed to constitute only a small percentage of all federal litigation yet generated a large share of the difficult case administration and case management problems.

At its October 1997 meeting, the advisory committee reviewed all the materials and the specific proposals presented and discussed at the symposium. It expects to begin considering specific proposed rules amendments at its spring 1998 meeting to address the concerns identified at the symposium and the discovery-related recommendations contained in the Judicial Conference's 1997 report to Congress on the Civil Justice Reform Act, including the advisability of national, uniform provisions on disclosure.

Special Copyright Rules

The Special Copyright Rules are prescribed by the Supreme Court and set out in 17 U.S.C.A. following § 501. As written, the current rules are outdated and have changed little since their enactment in 1909. Further, several provisions are of questionable constitutionality

and others are inconsistent with superseding legislation. In 1964 these problems prompted the advisory committee to recommend that the copyright rules be abrogated and that Civil Rule 65 be amended to provide an impoundment procedure for articles involved in an alleged copyright infringement. But it withdrew its recommendation because Congress was considering a thorough revision of the copyright laws. The revision was eventually enacted in 1976.

The advisory committee has again actively solicited informed comment from organizations and experienced counsel on the need to update the copyright rules, and it plans to study specific proposed amendments at its March 1998 meeting. The advisory committee intends to coordinate its actions on copyright rules with the House Judiciary Subcommittee on Courts and Intellectual Property in response to Representative Howard Coble (R-NC), chairman of the subcommittee, whose letter expressed concern that any proposed amendment might interfere with pending copyright legislation and ongoing United States multilateral treaty obligations.

Mass Torts Project

The Chief Justice has approved the establishment of an informal working group to study mass torts. The group will consist of liaisons from relevant Judicial Conference committees coordinated by the Civil Rules Advisory Committee. A report on the status of the project will be prepared in 12 months.

FEDERAL RULES OF CRIMINAL PROCEDURE

Legislation Reducing Grand Jury Size

The Committees on Criminal Law and Court Administration and Case Management referred to the Standing Rules Committee consideration of H.R. 1536 (105th Congress), a bill introduced by Representative Bob Goodlatte (R-VA) that would reduce the size of a grand jury

to not less than nine, nor more than thirteen persons and would require at least seven jurors to concur in an indictment so long as nine members were present.

The Advisory Committee on Criminal Rules reviewed the extensive work product of its 1975 predecessor committee, which found the proposal constitutional and favored similar proposed legislation. Although acknowledging the legal authority for the pending legislation and the relatively modest cost-savings associated with it, several members concluded that such a revision would be imprudent. The state chief justice who serves on the advisory committee noted the unfavorable experiences with a reduction in grand jury size in his own state. The representative from the Department of Justice noted the Department's opposition to the bill. Other members saw no problem with existing grand jury practices, and they were concerned with any proposed change of a historical and fundamental feature of American jurisprudence absent compelling reasons.

The advisory committee recognized that in most — but not all — grand jury proceedings, the prosecutor's request is approved without modification. It nonetheless voted to oppose the pending legislation for three reasons. First, a reduced grand jury would increase the possibility of a runaway prosecution. Second, a reduced grand jury would have less diversity of viewpoints and experiences. Finally, citizen participation would be diminished with a reduced size grand jury.

The Standing Committee agreed with the recommendation of the advisory committee, and it recommends that the Judicial Conference oppose H.R. 1536.

Recommendation: That the Judicial Conference oppose H.R. 1536 (105th Congress), which would reduce the size of a grand jury.

Other Pending Legislation

The advisory committee considered criminal rules-related provisions in several other bills. It expressed grave concerns with the provisions of § 502 of the Omnibus Crime Control Act of 1997 (S. 3 — 105th Congress), which would reduce the size of a petit jury in a federal criminal trial to six persons with the defendant's consent. The advisory committee concluded that no change in the size of a jury was warranted. It was also concerned that in some cases defense counsel may perceive pressure from the trial judge to waive a 12-person jury.

Section 501 of the Omnibus Crime Control Act of 1997 would amend Criminal Rule 24(b) by equalizing the number of peremptory challenges between the defendant and the government. The rules committees have considered similar proposals during the past two decades. In 1976, they recommended that the defense and prosecution be given an equal number of peremptory challenges. In later rejecting the same amendments, which were approved by the Judicial Conference (JCUS-SEPT 75, p. 76) and prescribed by the Supreme Court, the Senate Judiciary Committee noted that the proposal had received the greatest amount of criticism in its hearing and in submitted correspondence. In 1990, the Standing Committee rejected a proposal to equalize the number of peremptory challenges after reviewing the substantial opposition expressed during the public comment stage; and the advisory committee revisited but ultimately declined to act on a similar proposal in 1993. In part, the rules committees' views were based on deference to the perceived will of Congress on this subject.

At its October 1997 meeting, the advisory committee decided that a sufficient period of time has elapsed since Congress last addressed this issue, and a fresh review was appropriate. It

requested the reporter to draft proposed amendments to Rule 24 that would provide 10 peremptory challenges to each side in a noncapital case for consideration at its next meeting.

On another matter, the advisory committee declined to proceed on a proposal to amend Rule 5 to authorize a magistrate judge to continue a preliminary examination without the defendant's consent, thereby requiring an order of a district court judge. It was noted that no major problems with the existing practices had been reported, although the likelihood of experiencing these problems in "large" district courts was acknowledged. Under 18 U.S.C. § 3060 the defendant's consent is required. Amending Rule 5 to eliminate the requirement of consent would invite a "supersession clause" confrontation. The advisory committee concluded that the relatively modest benefits derived from the amendment were not worth risking the possibility of such a confrontation.

The advisory committee also considered pending legislation which would amend several rules of criminal procedure to provide for the right of a victim to address the court at various stages of the proceeding. The chair appointed a subcommittee to follow the progress of the proposed legislation and, if the proposed legislation appeared likely to be adopted, to report to the advisory committee and be prepared to offer alternative language to the victim allocution provisions. The matter is on the agenda for the advisory committee's April 1998 meeting.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on the Rules of Evidence proposed amendments to Rules 103, 404, 803, and 902 and recommended that they be published for public comment.

Rule 103(a) (Rulings on Evidence) would be amended to establish a uniform practice among the courts regarding the finality of rulings on motions concerning the admissibility of evidence, i.e., *in limine* rulings. The amendment provides that a claim of error with respect to a

definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a) — a renewed objection or offer of proof is not necessary at the time the evidence is to be offered. The proposed amendment also codifies the principle of *Luce v. United States*, 469 U.S. 38 (1984), concerning the preservation of a claim of error when admission of evidence is dependent on an event occurring at trial. It would apply in civil and criminal cases.

The proposed amendments to Rule 404(a) (Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes) provide that when the accused attacks the character of a victim, a corresponding character trait of the accused is admissible. The amendments are consistent with the intent of pending legislation (S. 3 — Omnibus Crime Control Act of 1997, § 503). But the proposed amendments clearly limit the admissibility of evidence to a corresponding trait. They would not permit a general attack on the defendant's credibility, for example, whenever the defendant attacks the character of the victim.

Rules 803(6) (Hearsay Exceptions; Availability of Declarant Immaterial) and 902 (Self-Authentication) would be amended to establish a procedure by which parties can authenticate certain records of regularly conducted activity (e.g., business records), other than through the testimony of foundation witnesses. The proposal is based on the procedures governing the certification of foreign records of regularly conducted activity in criminal cases as provided by 18 U.S.C. § 3505. The amendments are intended to establish a similar procedure for domestic and foreign records offered in civil cases.

The Committee voted to circulate the proposed amendments to the bench and bar for comment at the regularly scheduled time.

Rules on Experts and *Daubert*

The advisory committee continued to study whether Rule 702 should be amended to account for changes wrought by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). A subcommittee was appointed to prepare a working draft of proposed amendments to Rule 702 for the committee's consideration at its April 1998 meeting.

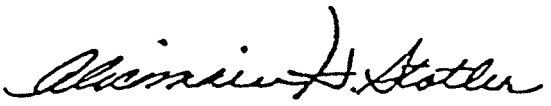
Other Informational Items

The advisory committee's reporter submitted a memorandum that identified statements contained in the original Advisory Committee Notes to proposed Evidence Rules amendments that are either wrong as written, or ambiguous because the original draft commented upon was later materially changed by Congress. These "historical" notes have caused confusion among readers unaware of the original mistakes or the subsequent congressional intervention. The advisory committee agreed that the memorandum should be distributed under Federal Judicial Center auspices to publishers and other interested persons. The memorandum would not be published as the work product of the Evidence Rules Committee, but rather as a work of the reporter in his individual capacity.

RULES GOVERNING ATTORNEY CONDUCT

The Standing Committee reviewed several specific proposals prepared by its reporter providing uniformity in rules governing attorney conduct. Options presented to the committee included a set of "core" national rules combined with a general default provision that relies on the applicable state law. The committee referred the proposed rules to the advisory committees for their consideration.

Respectfully submitted,



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Gene W. Lafitte
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Morey L. Sear
Alan C. Sundberg
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William R. Wilson, Jr.

Item 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
DRAFT MINUTES of the Meeting of January 8-9, 1998
Santa Barbara, California

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Santa Barbara, California on Thursday and Friday, January 8-9, 1998. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Alan C. Sundberg, Esquire
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Associate Attorney General Eileen C. Mayer represented the Department of Justice at the meeting. Member Patrick F. McCartan, Esquire was unable to be present.

Participating in the meeting, at the request of the chair, were Judge Frank H. Easterbrook, former member of the committee, and Judge Harry L. Hupp, representing the Judicial Conference Committee on Court Administration and Case Management.

Supporting the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; and Mark D. Shapiro, senior attorney in that office.

Representing the advisory committees were:

Advisory Committee on Appellate Rules -
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules -
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules -
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules -
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, project director of the Local Rules Project; and Thomas E. Willging and Marie Leary of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Stotler introduced the new advisory committee chairs — Judge Garwood of the Advisory Committee on Appellate Rules and Judge Davis of the Advisory Committee on Criminal Rules— and the new advisory committee reporter — Professor Schiltz of the Advisory Committee on Appellate Rules. Following committee tradition, all the members, participants, and observers introduced themselves in turn and made brief remarks.

September 1997 Judicial Conference Action

Judge Stotler reported that the committee's September 1997 report to the Judicial Conference had been placed on the Conference's consent calendar and all its recommendations approved without change. The proposed rules amendments in the report had been submitted to the Supreme Court shortly after the Conference meeting and were scheduled to take effect on December 1, 1998.

Judge Stotler added that the members of the committee had been provided with copies both of the committee's report to the Conference and the package of amendments and supporting materials transmitted to the Supreme Court in November 1997. She noted that she had included in the Supreme Court package a memorandum to the justices summarizing the amendments and inviting them to contact her or the advisory committee chairs for any assistance. She said that the Court had not yet acted on the amendments.

Judicial Conference Committee Practices and Procedures

The committee considered suggested changes in Judicial Conference committee practices and procedures and authorized the chair to communicate the committee's views to the Executive Committee of the Conference.

Federal Courts Improvement Act

Judge Stotler reported that the Executive Committee of the Judicial Conference had asked each committee of the Conference to review the Federal Courts Improvement Act of 1997 — a comprehensive compilation of various legislative recommendations approved by the Judicial Conference — and to identify any provisions that should be deleted from the bill. The Executive Committee advised that it intended to conduct similar reviews of all pending Conference legislative positions contained in future court improvements acts at the beginning of each Congress with a view towards eliminating any provisions that are no longer needed or have virtually no chance of being enacted.

Several members expressed support for this new procedure. None of the members, however, identified any provision in the current legislation that should be deleted.

Authority of the Federal Judicial Center and the Administrative Office

Judge Stotler reported that an ad hoc committee of the Judicial Conference had been appointed to consider two motions forwarded by the director of the Federal Judicial Center regarding: (1) the respective mission and authority of the Federal Judicial Center vis a vis the Administrative Office in education and training, and (2) the creation of a special mechanism to resolve disputes between the two organizations. She advised that she had asked Chief Judge Sear to appear before the ad hoc committee as the representative of the rules committees to address the potential impact of these proposals on the work of the rules committees. She added that Chief Judge Sear had spent considerable time studying the history of these matters and had served on the Judicial Conference, its Executive Committee, and several other Conference committees.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 19-20, 1997.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 18 bills had been introduced in the Congress that would impact, directly or indirectly, on the federal rules and the rules process. A status report of each bill had been included in Agenda Item 3A.

He pointed out that the Civil Justice Reform Act of 1990 had expired generally on December 1, 1997. The Congress, however, had recently amended the Act's sunset provision to make 28 U.S.C. § 476 a part of permanent law, thereby requiring continued public reporting of individual judges' pending motions, trials, and cases. The Congress also had continued 28 U.S.C. § 471 into permanent law, requiring each district court to implement a civil justice expense and delay reduction plan. Judge Hupp reported that the Court Administration and Case Management Committee had on its pending agenda a proposal to seek legislation repealing 28 U.S.C. § 471.

Professor Coquillette advised that it had been anticipated that local Civil Justice Reform Act plans would all sunset in 1997. Thereafter, local procedural provisions would have to be promulgated formally as local rules through the process specified in the Rules Enabling Act. He suggested that the continuation of 28 U.S.C. § 471 by the Congress could create mischief because it might be argued that courts could continue to operate under local plans that are inconsistent with the national procedural rules.

Mr. Rabiej stated that comprehensive crime control legislation had been introduced in the Congress that would impact on both the criminal rules and the evidence rules. He added that the Advisory Committee on Criminal Rules and the Advisory Committee on Evidence Rules had considered the proposed legislation at their fall meetings. An analysis of the pertinent provisions in the legislation was contained in correspondence from Judge Stotler to Senator Hatch and set forth in Agenda Item 3A.

Mr. Rabiej reported that several bills had been introduced in the Congress to provide constitutional or statutory rights to victims of crimes. He noted that the bills, among other things, would give victims the right to notice of court proceedings and the right to address the court.

He pointed out that, at the request of the Department of Justice, civil forfeiture legislation had been introduced that would, among other things, alter the time limits set forth in the admiralty rules and conflict with proposed amendments to those rules recently approved by the Advisory Committee on Civil Rules. He noted that the Department of Justice was working with the advisory committee to ensure that the differences between the proposed legislation and the admiralty rules were eliminated.

Mr. Rabiej reported that recently introduced legislation would enact, with style revisions, the committee's proposed new FED. R. CRIM. P. 32.2, governing criminal forfeiture proceedings. He pointed out that the committee had published the rule for public comment in August 1997, and Judge Stotler had written to the chairman of the House Judiciary Subcommittee on Crime requesting that he defer action on the bill until the rulemaking process has been completed and the bench, bar, and public have an opportunity to review and comment on the rule.

Finally, Mr. Rabiej reported that Representative Howard Coble, chair of the House Judiciary Subcommittee on Courts and Intellectual Property, had written to Judge Niemeyer, chair of the Advisory Committee on Civil Rules, requesting that the committee delay consideration of any changes in the copyright rules in order to allow Congress to consider the need for changes in substantive law.

Administrative Actions

Mr. Rabiej reported that his office had assembled a docket of all actions of the Advisory Committee on Evidence Rules over the past four years, and it had updated the dockets for the other advisory committees. He stated that a letter was being circulated for approval requesting that courts send their local rules to the Administrative Office in electronic format for posting on the Internet. Finally, Mr. Rabiej stated that the Administrative Office had compiled and published the committee's working papers on attorney conduct and was proceeding to compile the working papers of the Advisory Committee on Civil Rules on its discovery project.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) Among other things, she noted that substantial progress had been made in installing the judiciary's new satellite television facilities and that the Center was producing many new seminars and television programs, including programs on evidence and voir dire.

Mr. Willging stated that the Research Division of the Center had conducted a national survey of 2,000 lawyers in recently terminated civil cases (of whom 59% responded), examining the frequency and nature of problems in discovery, the impact of the 1993 amendments to the civil rules, and the need, if any, for additional rules changes. He said that the lawyers reported that comparatively little discovery activity occurred in the great majority of cases. Moreover, the cost of discovery was generally about 50% of the total litigation cost and about 3% of the financial stakes in the litigation.

The attorneys reported that they had experienced relatively few problems with discovery in general. Most of the problems they had in fact encountered appeared to have occurred in large, complicated cases, where both contentiousness and financial stakes were high.

Mr. Willging said the survey had disclosed that mandatory disclosure procedures were in wider use than previously thought. Even in districts opting out of FED. R. CIV. P. 26(a), a sizeable number of the judges imposed mandatory disclosure. The Center, he noted, had found

that a majority of the lawyers responding to the survey reported that they had not experienced any measurable effect from mandatory disclosure. But a majority of those reporting an effect stated that mandatory disclosure had been favorable in reducing cost and delay, in promoting settlement, and in increasing procedural fairness.

He reported that the Center had been unable to replicate the finding of the RAND Civil Justice Reform Act study that early discovery cutoffs are related to reducing cost and delay. The Center had not found any statistically significant or otherwise meaningful correlation between the length of the discovery cutoff period and litigation costs or the time to disposition of civil cases. He concluded that in the absence of further research, the empirical data did not support imposing national discovery cutoffs.

Mr. Willging further reported that the Center was in the process of analyzing experiences in districts that have imposed less restrictive disclosure requirements than FED. R. CIV. P. 26(a), *i. e.*, requiring disclosure only of information supporting a party's claim or defense. The Center is also analyzing local rules and general orders that impose specific limits on interrogatories and depositions.

One member of the committee suggested that there was a need for the civil rules to address the issues of discovery conducted by court-appointed experts. Mr. Willging noted that the Center was examining the use of court-appointed experts in the breast implant cases.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of November 14, 1997. (Agenda Item 5)

He reported that, after four years of work, the advisory committee had completed its restyling of all the appellate rules. The package of proposed amendments had been approved by the Judicial Conference in September 1997 and forwarded to the Supreme Court.

Judge Garwood said that the advisory committee had handled a large agenda at its September 1997 meeting, consisting of a general review of all matters still pending on its docket. The committee eliminated many items from the docket, identified several items that merited further study, and established priorities for future committee agendas.

He pointed out that the advisory committee had approved a change in FED. R. APP. P. 31, to require that briefs be served on all parties. But the committee decided as a matter of policy not to forward any further rules changes to the Standing Committee until the restyled appellate rules have been in effect for a while.

Judge Garwood reported that the advisory committee was considering the advisability of uniform national rules on the publication of court opinions that would address, among other things, such issues as the precedential effect, if any, of unpublished opinions. He noted that the subject matter is addressed in many local rules of the circuits, but those rules conflict with each other in several respects. He added that the Court Administration and Case Management Committee was also looking into the matter, and that he had conferred with Judge Brock Hornby, chair of that committee. They had agreed that it was appropriate for both committees to examine the subject, but the Advisory Committee on Appellate Rules might have a more immediate concern because it is covered in local circuit court rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier presented the report of the advisory committee, as set forth in his memorandum and attachments of December 2, 1997. (Agenda Item 6)

Judge Duplantier reported that the advisory committee had no action items to present. He noted that a package of bankruptcy rules amendments was pending before the Supreme Court and, if approved, would take effect on December 1, 1998. Another set of 16 proposed amendments had been published for comment in August 1997 and would be considered at the advisory committee's March 1998 meeting.

He noted that the advisory committee had a major project underway to revise the litigation provisions of the Federal Rules of Bankruptcy Procedure. He explained that the project had emanated from a survey of bankruptcy judges and lawyers conducted by the Federal Judicial Center in 1996. The results of the survey showed that there was general satisfaction with the substance and organization of the bankruptcy rules, but significant dissatisfaction was expressed with the rules governing motion practice.

Judge Duplantier stated that the project of rethinking and reorganizing the litigation rules was very complex and controversial. It had taken up a great deal of the committee's time over the past two years.

Professor Resnick stated that the revisions that the advisory committee was considering would not affect adversary proceedings, which are akin to civil cases in the district courts and are governed largely by the Federal Rules of Civil Procedure. Rather, the proposed amendments would materially change the procedures for handling (1) routine administrative matters that are usually unopposed, and (2) "contested matters." He explained that the latter category of bankruptcy matters are usually initiated by motion, but are not like motions filed in the district courts. They may involve complex disputes that are unrelated to any other litigation in a bankruptcy case.

Professor Resnick reported that the advisory committee was in the process of considering the recommendations contained in the October 1997 report of the National Bankruptcy Review Commission. He noted that the report was more than 1,300 pages long and contained 172 recommendations. He pointed out that many of the Commission's recommendations called for substantive changes in the Bankruptcy Code, which — if enacted — would eventually require conforming changes to the rules. He noted, for example, that the report recommended giving Article III status to bankruptcy judges. If signed into law, this provision would likely eliminate the need in both the Code and the rules for maintaining distinctions between "core" and "non-core" proceedings.

Other Commission recommendations were directed expressly to the Advisory Committee on Bankruptcy Rules and called for specific changes in the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms.

Professor Resnick stated that he was in the process of drafting a report on the Commission's recommendations for the advisory committee's consideration at its March 1998 meeting. He added that it was unlikely that there would be a single, comprehensive bill introduced in the Congress to enact all the recommendations of the Commission. Rather, several bills are likely to be introduced by various members of Congress, incorporating some of the Commission recommendations and offering other proposals contrary to the Commission's recommendations.

He reported that the advisory committee has also been considering proposals to improve the effectiveness of notices to governmental units in bankruptcy cases. He pointed out that, under current practice, governmental offices experience difficulties in having bankruptcy notices routed to them in time to take appropriate action in a case. He added that the advisory committee had been dealing with this problem for some time and that, at the committee's invitation the chairman of the bankruptcy commission had attended committee meetings and presented their views and proposed solutions.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of December 8, 1997. (Agenda Item 7)

Amendments to the Admiralty Rules

Judge Niemeyer reported that the advisory committee was seeking the Standing Committee's approval to publish proposed amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims and a conforming amendment to FED. R. CIV. P. 14. He

explained that the changes had been prompted in large part by the increasing use of admiralty in rem procedures in civil forfeiture proceedings.

Judge Niemeyer explained that the proposed amendments had been prepared over a long period of time with the assistance of a special subcommittee, chaired by advisory committee member Mark Kasanin. He said that the subcommittee had worked from proposals drafted by the Maritime Law Association and the Department of Justice, and it had analyzed and monitored proposed civil forfeiture legislation pending in Congress. He added that the chair of the Maritime Law Association's rules committee and a representative of the Department of Justice had participated in the advisory committee's October 1997 meeting.

Professor Cooper explained that there had been increased use of the admiralty in rem procedures for drug-related civil forfeiture proceedings. The advisory committee determined, however, that there was a need to make certain distinctions in the rules between pure admiralty proceedings and forfeiture proceedings. To that end, the proposed amendments would provide a longer time to respond in forfeiture proceedings than in admiralty proceedings. It would also provide an automatic right to participate to a broader range of persons who assert rights against the property in forfeiture proceedings than in admiralty proceedings.

He also pointed out that FED. R. CIV. P. 4 had been amended in 1993, but conforming changes had not been made in the admiralty rules. He said that it was time to correct that omission.

He noted that the advisory committee had decided that it should, as far as possible, make stylistic improvements in the admiralty rules, using the style conventions incorporated in the recent omnibus revision of the appellate rules. Nevertheless, the committee believed that it was necessary to preserve certain traditional admiralty terminology.

He added that the style subcommittee had suggested changes in the language of the amendments following the October 1997 advisory committee meeting, most of which had been included in the draft set forth in Agenda Item 7. He noted that Mr. Spaniol had also suggested a number of thoughtful stylistic changes, but the advisory committee had not had time to consider them fully and recommended that they be included with the public comment materials.

ADMIRALTY RULE B

Professor Cooper reported that the advisory committee was proposing three changes to Rule B, which deals with maritime attachment and garnishment in in personam actions.

First, new Rule B(1)(d)(ii) would allow service to be made by persons other than the United States marshal when the property to be arrested is not a vessel or tangible property on

board a vessel. This change would adopt the service provisions of Rule C(3) providing service alternatives in an in rem proceeding. Where the property is a vessel, however, service under item (d)(i) may only be made by the marshal.

Second, the revised rule would eliminate the current rule's reference to FED. R. CIV. P. 4 and state quasi in rem jurisdiction remedies. Instead, revised Rule B(1)(e) refers expressly to FED. R. CIV. P. 64, ensuring that Rule B is not inconsistent with Rule 64 in a way that would prevent an admiralty plaintiff from invoking state-law remedies.

Third, the revised rule conforms the notice provisions of subdivision (2) to revised FED. R. CIV. P. 4, without designating any of its subdivisions.

Some members stated that there was an ambiguity in Rule B, which limits the use of maritime attachment and garnishment to cases in which the defendant is not found in the district. They explained that a defendant occasionally will appoint an agent for service of process after the action is commenced, hoping by this means to defeat attachment or garnishment. Rule B can be read to provide that the defendant is "found" in the district only at the moment the action is commenced, but this reading is not entirely clear. Dissatisfaction also was expressed by some members with ex parte proceedings, noting that plaintiffs "always appear at 4:45 on Friday afternoon." It was suggested that the advisory committee might explore these matters and consider future rules amendments to deal with them.

ADMIRALTY RULE C

Professor Cooper said that the proposed advisory committee note to revised Rule C provided statutory references and an introduction and background to the rule. He pointed out that a growing number of statutes invoke admiralty in rem proceedings for forfeiture proceedings. But Rule C, governing in rem actions, had not been adjusted to reflect that reality. Accordingly, most of the proposed amendments to Rule C were designed to distinguish between pure admiralty proceedings and forfeiture proceedings.

He noted that a number of forfeiture statutes permit a forfeiture proceeding against property that is not located in the district. The proposed new item C(2)(d)(ii) would reflect those statutory provisions. Paragraph C(3)(b)(i) would be amended to specify that the marshal must serve any supplemental process addressed to a vessel or tangible property on board a vessel, as well as the original warrant.

He said that Rule C(4) provided for notice and contained two changes. The first would require that public notice state both the time for filing an answer and the time for filing a statement of interest or claim. The second would allow termination of publication if the property is released more than 10 days after execution but before publication is completed.

Professor Cooper stated that the most important changes in Rule C were set forth in subdivision (6). The advisory committee had created separate paragraphs on responsive pleading to distinguish civil forfeiture actions from maritime in rem proceedings. He pointed out that, in admiralty actions, a response must be filed within 10 days of execution of process or completed publication of notice. He said that the need for speed is not as great in forfeiture proceedings, and the advisory committee proposal would allow 20 days to respond. He added that legislation pending in the Congress would amend Rule C to provide for a uniformly longer period of 20 days in both admiralty proceedings and forfeiture proceedings.

A second distinction related to who may participate in the proceeding. In a forfeiture action, the rule would allow anyone who asserts an interest in, or right against, the property to file a response. The admiralty provision reflects the long-standing rule that only those who assert a right of possession or an ownership interest in the property may respond.

He pointed out that paragraph C(6)(c) authorized interrogatories to be served with the complaint in an in rem action without leave of court. This provision departed from the general provision of FED. R. CIV. P. 26(d) requiring that discovery be deferred until after the parties have met and conferred. He explained that the special needs of expedition that often arise in admiralty justify continuing the practice of allowing interrogatories to be filed with the complaint in an in rem proceeding.

ADMIRALTY RULE E

Professor Cooper stated that Rule E, governing in rem and quasi in rem proceedings, would be amended to reflect statutory provisions that permit service of process outside the district in certain forfeiture proceedings. But service in an admiralty or maritime proceeding still must be made within the district. Professor Cooper added that he had conferred with representatives of the Department of Justice, who informed him that they were unaware of any quasi in rem forfeitures. Accordingly, he recommended that the words "or quasi in rem" be deleted from Rule E(3)(b).

He said that the proposed amendment to subdivision (7)(a) would make it clear that a plaintiff must give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security in the original action.

Subdivision (8) would reflect the proposed change in Rule B(1)(e) that would delete the provision in the current rule authorizing a restricted appearance when state quasi in rem jurisdiction provisions are invoked.

Subdivision (9)(b)(ii) would be amended to reflect the changes in terminology made in amended Rule C(6), substituting "statement of interest or right" for "claim." Judge Niemeyer explained that the advisory committee had retained the word "claim" in the amended admiralty rules only where it was consistent with the meaning of that term as used in FED. R. CIV. P. 9. In all other cases, it had been eliminated because it had created confusion. Professor Cooper added that the word "claim" had different meanings in the current admiralty rules.

Professor Cooper said that subdivision (10) was new. It would make clear that the court has authority to preserve and prevent removal of attached or arrested property remaining in the possession of the owner or another person.

FED. R. CIV. P. 14

Professor Cooper explained that the proposed change in terminology in Rule C(6), eliminating the terms "claim" and "claimant" required parallel changes in FED. R. CIV. P. 14(a) and (c).

Judge Niemeyer explained that in revising the admiralty rules the advisory committee had not attempted to change admiralty law or address all current procedural problems. It just intended to preserve the admiralty process, fill in some of the gaps in the process, and improve the organization and language of the rules.

Judge Niemeyer stated that the representatives from the Maritime Law Association and the Department of Justice who had worked on the proposal had recommended that the period of public comment on the proposed admiralty amendments be reduced from the normal six months to three months. An abbreviated comment period could expedite the effective date of the amendments by one year. He stated, however, that the advisory committee had decided that there was not a sufficient emergency to justify reducing the period for public comment on the proposals.

Professor Cooper stated that the advisory committee had approved a draft revision of Rule E(3)(a) and was presenting it to the Standing Committee together with alternative language rejected by the advisory committee but preferred by Messrs. Garner and Spaniol. He asked whether the amendments published for public comment should include both the advisory committee's approved language and the alternative language. **The committee decided to publish only the version approved by the advisory committee.**

The committee voted without objection to approve the proposed amendments to the admiralty rules for publication.

Informational Items

Judge Niemeyer stated that the advisory committee in August 1996 had published several proposed changes to FED. R. CIV. P. 23, dealing with class actions. But after considering the public comments and conducting public hearings, the advisory committee voted to forward only two of the proposed changes to the Standing Committee.

At its June 1997 meeting, the Standing Committee approved one proposed amendment to Rule 23 — to authorize interlocutory appeals of class action certification determinations. That change was later approved by the Judicial Conference and forwarded to the Supreme Court. It is scheduled to take effect on December 1, 1998, if approved by the Court and not altered by Congress.

Judge Niemeyer said that the advisory committee had deferred consideration of the other proposed changes to Rule 23, largely because a consensus could not be reached on them. The committee had decided, for example, that further case law development was necessary on such issues as settlement classes and maturity of litigation.

The committee, moreover, concluded that many of the solutions to the problems of mass torts lay beyond its own jurisdiction and might require legislation. Therefore, it had recommended that a task force be formed across Judicial Conference committee lines to address broadly the problems of mass torts.

Judge Niemeyer reported that the Chief Justice had approved a modified version of the advisory committee's proposal, authorizing an informal working group, under the leadership of the Advisory Committee on Civil Rules, to study the problems of mass torts litigation over a 12-month period and make recommendations for further action. He said that Judge Anthony Scirica would serve as chair of the working group and that Professor Francis McGovern would serve as special consultant to the group.

Judge Niemeyer reported that the advisory committee had sponsored a symposium on discovery at Boston College Law School in September 1997. The program focused on the costs of discovery and whether the benefits of discovery to the dispute resolution process are worth those costs. He reported that the symposium had been a great success. Members of the Standing Committee had attended, together with corporate counsel, experienced plaintiff lawyers and defendant lawyers, representatives of national bar organizations, leading academics, and other judges. He added that several consensus themes emerged from the symposium, including the following:

1. The discovery process works well in most civil cases.
2. There are, however, serious problems in a small percentage of civil cases.
3. Full disclosure is a policy inherent in federal practice and should be retained.
4. Too much discovery is generated in certain cases.

5. Uniformity of practice among federal districts is a desirable goal.
6. Attorney costs related to discovery account for about 50% of litigation costs in civil cases.
7. In large cases, plaintiffs complain about the number and costs of depositions. In fact, depositions are the largest single cost item for plaintiffs.
8. Defendants, on the other hand, complain most about the amount and cost of document discovery. They point particularly to heavy costs incurred in reviewing documents and compiling logs in order to avoid waiving privileges.
9. Ready access to a judge in order to resolve discovery disputes is number one on the lawyers' wish list.
10. Both plaintiffs and defendants favor fixed trial dates and discovery cutoff periods.
11. Mandatory disclosure draws mixed opinions among the bar. Some attorneys like it, and others do not. The empirical data from the early academic studies, moreover, are also inconclusive.

Judge Niemeyer stated that the advisory committee planned to offer amendments to the discovery rules in light of the "sunsetting" of the Civil Justice Reform Act. He added that the committee was striving for greater national uniformity, particularly in such areas as disclosure. He pointed out that the advisory committee was examining a range of other discovery issues, including the appropriate scope of discovery.

He stated that the advisory committee would consider, at its March 1998 meeting, a package of proposed amendments addressing both the concerns identified at the symposium and the discovery-related recommendations contained in the Judicial Conference's 1997 report to Congress on the Civil Justice Reform Act. The advisory committee then plans to present a package of recommendations for publication at the Standing Committee's June 1998 meeting. He added that it was very important for the committees to achieve broad consensus on a package that is widely acceptable to both bench and bar.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of December 1, 1997. (Agenda Item 9)

Reduction in the Size of Grand Juries

Judge Davis reported that the advisory committee had been asked to study a pending legislative proposal (H.R. 1536) that would reduce the size of grand juries to not less than nine jurors nor more than 13, with seven jurors required to return an indictment. Currently, under FED. R. CRIM. P. 6(a) — which tracks 18 U.S.C. § 3321 — the size of a grand jury is 16 to 23

persons, with a requirement that 16 be present. Under Rule 6(f), 12 jurors must concur in order to return an indictment.

He stated that the advisory committee had voted unanimously to oppose any reduction in the size of the grand jury. He noted that several members of the committee believed that most people serving on grand juries have a positive feeling about the experience and that it was sound policy to have more, rather than fewer, persons involved in the grand jury process. Other members had stated that a reduction in the size of the grand jury would increase the likelihood of runaway indictments. He reported also that the state chief justice who serves on the advisory committee had pointed out that his state had reduced the size of grand juries, and that the experience had not been successful. Finally, he mentioned that the Department of Justice was opposed to legislating a reduction in the size of the grand jury.

Judge Davis reported that the advisory committee was recommending that the Judicial Conference go on record as opposing any attempts to reduce the size of grand juries. Judge Stotler asked whether the proposed Judicial Conference action should state a general policy or merely be directed to commenting on the specific provisions contained in H.R. 1536. In response, Judge Davis amended the advisory committee's recommendation to limit its reach to address only the specific pending legislation.

The committee voted unanimously to approve the recommendation of the advisory committee to have the Judicial Conference oppose H.R. 1536, which would reduce the size of the grand jury.

Informational Items

Judge Davis reported that the advisory committee had received many comments on the proposed amendment to FED. R. CRIM. P. 6, which would authorize any interpreter necessary to assist a jury to be present at a grand jury proceeding.

He pointed out that the advisory committee had proposed amending 18 U.S.C. § 3060 to remove its prohibition on a magistrate judge granting a continuance of a preliminary examination without the consent of the defendant. The Standing Committee, however, decided at its June 1997 meeting not to seek a statutory amendment. It referred the matter back to the advisory committee to consider making the change through an amendment to FED. R. CRIM. P. 5(c), which tracks the language of 18 U.S.C. § 3060. The advisory committee considered the matter afresh at its October 1997 meeting and decided that the problem sought to be addressed through the amendment was just not serious enough to warrant seeking an amendment to FED. R. CRIM. P. 5(c).

Judge Davis stated that the advisory committee had canceled the public hearings scheduled for December 12, 1997. Instead, it had invited the witnesses to appear at a hearing to be held contiguous to the committee's April 1998 meeting.

Judge Davis also reported that he had appointed a subcommittee to continue monitoring victims' rights legislation.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of December 3, 1997. (Agenda Item 10)

Action Items

Judge Smith reported that the advisory committee was seeking approval to publish three proposed amendments for public comment. She explained that the amendments were being brought to the Standing Committee at its January 1998 meeting in order to lessen the heavy agenda for the committee's June 1998 meeting. She added that the advisory committee did not intend to accelerate or otherwise change the regular schedule for public comment.

FED. R. EVID. 103

Judge Smith pointed out that the proposed amendment to Rule 103 — designed to clarify when an attorney must renew a pretrial objection to, or proffer of, evidence — had a long history. The advisory committee had published an amendment in September 1995, but withdrew it after publication because public comments demonstrated little consensus.

She noted that the advisory committee had redrafted the amendment at its April 1997 meeting and sought approval from the Standing Committee in June 1997 to publish it. The Standing Committee, however, questioned aspects of the proposal and referred it back to the advisory committee for further study. The advisory committee then took a fresh look at the rule at its October 1997 meeting and prepared a new draft amendment to meet the concerns voiced by the Standing Committee.

Judge Smith stated that the advisory committee had restructured the proposal from the earlier versions, now setting forth the changes as a new paragraph within subdivision (a). She explained that the proposed amendment would codify the principles of *Luce v. United States,* 469 U.S. 38 (1984) — concerning the preservation of a claim of error when admission of evidence is dependent on an event occurring at trial — and would make them applicable in both civil and criminal cases. She added that the advisory committee had tried to make clear that the rule applied to all rulings on evidence, whether made at or before trial, including in limine rulings. Finally, she pointed out that the proposed amendment appeared to be stylistically inconsistent with a convention established by the style subcommittee in that it contained an unnumbered paragraph in subdivision (a). She welcomed the input of the style subcommittee on this matter.

One of the members suggested that the advisory committee might consider dropping the word "definitive" from the first line of the amendments and eliminating the second sentence.

The committee voted without objection to approve for publication the proposed amendment to the rule.

FED. R. EVID. 404

Judge Smith said that the proposed amendment to Rule 404(a) had not been initiated by the Advisory Committee on Evidence Rules. Rather, the committee was responding to legislation pending in the Congress that would amend Rule 404(a) to provide that evidence of a criminal defendant's pertinent character trait is admissible if the defendant attacks the character of the victim. She pointed out that the majority of the advisory committee agreed generally with what the sponsors of the legislation were trying to achieve, but believed that the language of the legislation was too broad and would cause technical problems. The Congressional language, she suggested, appeared to allow the prosecution to introduce evidence of any character trait of the accused. Accordingly, the committee decided to draft its own version of Rule 404(a), providing that if a defendant attacks a character trait of the victim of the crime, the prosecution could offer evidence of the same character trait of the accused.

Judge Smith said that the advisory committee also wished to move an amendment to line 11 of its proposal by adding the words "offered by an accused and" before the word "admitted."

She also pointed out that the advisory committee had used the word "accused" rather than the word "defendant" because it was consistent with usage in the Federal Rules of Criminal Procedure.

Some of the members of the Standing Committee expressed disapproval of the proposal on the merits because it would lessen the rights of the accused in certain types of criminal cases. Judge Smith responded that the decision of the advisory committee to proceed with the amendment was not unanimous, and that the committee would not have proposed the change except for the pending legislation. She explained that the majority of the advisory committee were of the view that the proposal represented a fair trade-off, believing that if the defense introduces character trait evidence, the prosecution should be allowed to do so also.

Professor Capra pointed out that there was precedent for the advisory committee's approach, noting that the Judicial Conference had offered alternate language on FED. R. EVID. 413 to 415 when the Congress was considering enacting these rules by legislation.

The committee approved the proposed amendment for publication by an 8 to 3 vote.

FED. R. EVID. 803 and 902

Judge Smith reported that the proposed amendments to Rules 803(6) and 902 were designed to provide for uniform treatment of business records and to rectify an inconsistency in the present rules dealing with foreign records. She explained that admissibility of foreign business records can be established — without a foundation witness — by certifications in criminal cases, but not in civil cases. She said that the advisory committee believed that foreign records should not be deemed more trustworthy than domestic records in any cases. The amendments were based on the procedures governing the certification of foreign business records in criminal cases under 18 U.S.C. § 3055 and would establish a similar procedure for domestic and foreign records offered in civil cases.

She added that the language of the amendments differed in certain respects and it mixed the terms "certification" and "declaration." The advisory committee had done so to incorporate language from existing statutes. She said that if that approach would cause problems in distinguishing between the two, the language could be made consistent throughout to require certification by a signed declaration. She added that there was a typographical error in the agenda item, as the word "record" on lines 42 and 44 of the proposal should read "declaration."

The committee voted without objection to approve the amendments for publication.

Informational Items

Professor Capra explained that he had reviewed the original advisory committee notes to the Federal Rules of Evidence and produced the document set forth at Agenda Item 10B, identifying inaccuracies and inconsistencies created because several of the rules adopted by Congress in 1975 differ materially from the version approved by the advisory committee. He pointed out that the inconsistencies between the text of the rules, as enacted by legislation, and the accompanying advisory notes created a trap for the unwary. He added that the Federal Judicial Center had agreed to publish his memorandum.

Judge Smith reported that she had appointed a subcommittee to review Article VII of the evidence rules, dealing with opinions and expert testimony. She noted that there was legislation pending in the Congress that attempted — inadequately — to amend FED. R. EVID. 702 and codify *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). She pointed out that the advisory committee had decided in 1995 to delay considering any amendments to the evidence rules regarding expert testimony until the courts had been given enough time to digest and interpret the *Daubert* opinion. She reported, though, that the advisory committee at its October 1997 meeting had decided that there was now enough case law, and conflicts among the circuits, to justify consideration of amendments to Rule 702 to

clarify the standards of reliability applicable to expert testimony. The subcommittee will prepare a report for consideration by the advisory committee at its April 1998 meeting.

Judge Smith said that the advisory committee would also consider whether any amendments were necessary to accommodate technological innovations in the presentation of evidence. Among other things, it would review Rule 1001 to determine whether the terms "writings" and "recordings" should be redefined and whether they should apply to the entire body of the evidence rules.

Judge Stotler suggested that the Advisory Committee on Civil Rules should examine FED. R. CIV. P. 44, regarding proof of official records, to see whether it dovetails properly with provisions in the evidence rules. She also suggested that the advisory committee might wish to consider the advisability of a cross-reference to FED. R. EVID. 1001, regarding written records. She added that the Standing Committee had discussed in the past the issue of creating standard definitions that would apply throughout all the federal rules.

ATTORNEY CONDUCT

Professor Coquillette reported that a wealth of background materials had been specially prepared to assist the committee in determining whether national rules should be promulgated to govern attorney conduct in the federal courts. He pointed out that the materials included Agenda Item 8, seven background studies conducted by his office and the Federal Judicial Center, and the proceedings of two conferences of attorney conduct experts.

Professor Coquillette noted that the committee at its June 1997 meeting had requested him to draft a proposed set of uniform attorney conduct rules for discussion purposes. Therefore, he had prepared the 10 draft rules set forth in Agenda Item 8. He suggested that the members not debate the substance of the draft rules, but focus on the general approach and outline of the document. He recommended that if the committee were generally comfortable with the draft, it should be forwarded to each of the advisory committees for study and comment.

Professor Coquillette explained that proposed Rule 1 was a "dynamic conformity" rule, specifying that a district court must apply the standards of attorney conduct currently adopted by the highest court of the state in which the court sits. He pointed out that the proposed rule had the advantages of avoiding any conflicts with the states and obviating the need for a federal bureaucracy. He suggested that the first option that the committee might consider would be to adopt only Rule 1, thereby creating no uniform federal attorney conduct standards and leaving all issues of attorney conduct to the states.

A second option, he suggested, would be for the committee to do nothing regarding attorney conduct, thereby leaving the matter to local court rules. He recommended against that

course of action, however, because the participants in the committee's recent attorney conduct conferences had agreed overwhelmingly that the status quo was unacceptable. Although they had differed in their proposed solutions, there was a strong consensus that something had to be done to address attorney conduct in the federal courts in a more uniform manner.

Professor Coquillette stated that a third option would be to adopt proposed Rule 1 plus some, or all, of the other nine rules. He explained that he had selected the 10 rules very narrowly to address only those conduct issues that raise a substantial federal interest and have resulted in actual problems in the federal courts. All other matters would be deferred to the states.

He explained, for example, that proposed Rule 10 dealt with communication with persons who are represented by counsel, which is the subject of Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct. He emphasized that the matter was very controversial and had been the subject of lengthy negotiations between the Conference of Chief Justices and the Department of Justice. He recommended that the language eventually agreed upon by the Conference and the Department be incorporated as the national rule applicable in the federal courts.

Professor Coquillette noted that most attorney conduct issues addressed by the proposed rules arise in the district courts. Therefore, he recommended that the rules committees' efforts be directed principally to considering conduct rules for the district courts.

He noted that fewer attorney conduct problems arose in the courts of appeals. He pointed out that FED. R. APP. P. 46 authorized a court of appeals to take any appropriate action against an attorney for "conduct unbecoming a member of the bar." He said that the language of the rule was unworkably vague, prompting most courts of appeals to adopt their own local rules governing attorney conduct.

Professor Coquillette reported that the local rules of the bankruptcy courts generally adopted the rules of the district courts, but that bankruptcy practice presented a number of additional, unique problems because the Bankruptcy Code prescribed certain specific conduct standards of its own. For that reason, he stated that the Advisory Committee on Bankruptcy Rules was generally of the view that separate rules should be tailored to govern attorney conduct in bankruptcy practice. Professor Resnick added that Professor Coquillette's draft rules had specifically exempted bankruptcy proceedings, whether conducted by a bankruptcy judge or a district judge. He stated that it would be necessary — because of specific provisions in the Bankruptcy Code and pertinent case law — to consider drafting specific provisions governing such issues as disinterestedness and confidentiality in bankruptcy proceedings.

Mr. Schreiber moved that the package of proposed attorney conduct rules be referred to each of the advisory committees for review and comment by June, if possible.

Ms. Mayer stated that the Department of Justice favored reducing balkanization of attorney conduct rules in the federal courts. She explained that the Department would not support the option of simply adopting only Rule 1 of the proposed draft rules because it would turn over federal interests to the states and effectively turn state laws into national laws. She added that the Department also had problems with the specific language of some of the other nine draft rules.

Ms. Mayer pointed out that the Department was concerned about how the proposed attorney conduct rules would be interpreted and enforced. She emphasized that there was a need to lodge authority in the federal courts to issue binding interpretations of the rules.

Chief Justice Veasey stated that serious federalism interests were at stake. He personally favored adoption of only Rule 1 as the best solution and would not support adoption of all 10 proposed attorney conduct rules. He added, though, that substantial additional information and debate were essential before the committees could make meaningful decisions on the appropriate course of action to pursue.

He explained that a special committee of the Conference of Chief Justices had just arrived at a negotiated solution with the Attorney General on the controversial issue of communication with represented parties for consideration by the Conference at its annual meeting. [The Conference postponed its consideration of the proposal until a later time so that the members could have more time to study it carefully.] He noted, too, that the American Bar Association had appointed an ethics commission to study needed revisions to the rules of professional responsibility. He added that the commission, which he chaired, would convene following the meeting of the Conference of Chief Justices. In sum, he said, attorney conduct issues were receiving considerable attention at the highest levels of the legal profession. In light of this imminent activity and the evolving nature of the debate, he recommended that Professor Coquillette's draft federal rules be tabled.

Ms. Mayer suggested that the committee consider appointing an ad hoc subcommittee to review the proposed attorney conduct rules. Other members added that the rules could be referred to a special committee comprised of members from each of the advisory committees.

Several members countered that a better course of action would be to refer Professor Coquillette's draft and the supporting documentation to each of the advisory committees for study, with the expectation that there would be extensive coordination among the advisory committees, their reporters, and the Standing Committee.

One member stated that it would be impossible for the advisory committees to make any meaningful contributions in time for consideration at the Standing Committee's June 1998 meeting because the issues addressed in the proposed rules were simply too complex and controversial. He emphasized that it was essential for the committees to give appropriate deference to the rights of the states to oversee the conduct of the attorneys they license.

Accordingly, the committees needed to consider whether paramount federal interests were at stake that warranted superseding state rules in certain matters.

Judge Stotler stated that she did not favor directing the advisory committees to accomplish a specific task by a specific date. Rather, she emphasized the need for the advisory committees to make recommendations on the best ways to deal with the attorney conduct issues.

The committee agreed to have each advisory committee consider the proposed draft rules and supporting materials presented by Professor Coquillette and present status reports to the Standing Committee at its June 1998 meeting.

LOCAL RULES OF COURT

Uniform Renumbering of Local Rules

Professor Squiers reported that in March 1996 the Judicial Conference had required the courts to renumber their local rules in accordance with the national rules. As of June 1997, 41% of the district courts had renumbered their rules, and by December 1997, 58% had completed the renumbering. She said that she had contacted the remaining district courts by telephone to determine whether they were making progress in renumbering and had received largely positive responses.

Several members stated that the renumbering requirement had been very helpful in motivating the courts to review their local rules, improve them, and eliminate inconsistencies. They also said that the project had fostered the goal of greater national uniformity and would prove to be of substantial benefit to the bar.

Impact on Local Rules of the Expiration of the Civil Justice Reform Act

Professor Squiers reported that with the recent sunsetting of the Civil Justice Reform Act, she had examined the local CJRA plans of all the district courts. She found that 31% of the district plans referred to the court's local rules and specified the court's interest in eventually integrating the content of the plans into the court's local rules. The other plans were silent on the matter. Accordingly, she telephoned 12 district courts randomly and inquired whether they anticipated incorporating the content of their CJRA plans into their local rules or intended to use their CJRA plans in another fashion. She reported that seven of the 12 courts had already taken action to modify their local rules as of December 1997. Three of the courts said that they anticipated doing so at some point, and the remaining two districts reported that they contemplated taking no action.

Other Proposed Changes in Local Rule Requirements

A number of members added that it would also be beneficial to require courts to send their local rules to the Administrative Office for posting on the Internet. One participant suggested that consideration be given to amending the Rules Enabling Act to require that all local rules take effect on or shortly after December 1 of each year, in coordination with the effective date of amendments to the national rules. Judge Garwood responded that the Advisory Committee on Appellate Rules had placed that suggestion on its agenda. Another participant said that consideration might be given to amending the national rules to provide that local rules may not take effect until they are filed electronically with the Administrative Office

Judge Stotler agreed to refer to each of the advisory committees the various suggestions raised at the meeting regarding the effective date and the effectiveness of local court rules.

Judge Stotler requested that Professor Squiers and the Local Rules Project study the impact on local court rules of the 1995 amendments to FED. R. CIV. P. 83, FED. R. CRIM. P. 57, FED. R. BANKR. P. 8018 and 9029, and FED. R. APP. P. 47.

Limitations on the Number of Local Rules

Judge Wilson stated that there were too many local rules of court and too many local procedural variations. Therefore, he recommended that the rules committees take appropriate action to promote greater uniformity in federal practice and place limits on local rulemaking authority. **To that end, he moved to request that the Advisory Committee on Civil Rules study amending FED. R. CIV. P. 83 by striking the words "imposing a requirement of form" from subdivision (2) and adding a new subdivision (3) that would prohibit a court from adopting more than 20 local rules, including discrete subparts.**

The committee thereupon engaged in an extensive discussion regarding the number, scope, and merit of local rules. Some members stated that a number of courts were strongly attached to their own practices and would resist efforts to limit local rulemaking authority. They noted that the district courts had taken a wide variety of approaches to local rules. Some courts have very few local rules, while others have promulgated lengthy and detailed sets of rules.

Several members stated that there had been a long-standing consensus among the members of both the Standing Committee and the advisory committees that (1) there were too many local rules, and (2) local rules should fill the gaps in the national rules, rather than legitimize local variations in federal practice. Several pointed out that the rules committees had debated these issues extensively in the past and had concluded that it would not be feasible to eliminate local variations simply by limiting local rules. Local procedural variations would

likely continue in effect through the use of standing orders, individual case orders, and other, less formal mechanisms.

A number of members pointed out that the 1995 amendments to FED. R. CIV. P. 83 — together with companion amendments to FED. R. CRIM. P. 57, FED. R. BANKR. P. 8018 and 9029, and FED. R. APP. P. 47 — had been designed expressly to foster national uniformity by requiring that:

1. all local rules be consistent with the national rules and federal statutes;
2. all local rules conform to a national numbering system;
3. no local rule imposing a requirement of form be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement; and
4. no sanction or other disadvantage be imposed for noncompliance with any requirement not published in federal law, federal rules, or local rules, unless the alleged violator has been furnished with actual notice of the requirement in a particular case.

One member emphasized that the judicial councils of the circuits have — and should exercise — the authority to abrogate any local rules that are illegal or inconsistent with the national rules. He added that there was a need to collect and analyze more information on local rules. Professor Coquillette suggested that it would be very desirable for the Local Rules Project to conduct a new study of local rules, particularly in the wake of the sunset of the Civil Justice Reform Act.

Another member suggested that Judge Wilson amend his motion to have the Advisory Committee on Civil Rules study local rules issues broadly, rather than mandate that it consider a specific amendment to Rule 83. He added that the rules committees also needed to address local rule issues in both the district courts and the bankruptcy courts.

Judge Wilson agreed to amend his motion to require that the other advisory committees also study appropriate limitations on local rules. He added, however, that it was essential that the committees address the merits of imposing a national limit on the number of local rules that any court may promulgate.

Other members responded that it was premature to consider additional amendments to the rules governing local rules because the impact of the 1995 amendments had only begun to be felt. They warned, moreover, against changing the language of those amendments because they had been very carefully crafted and subjected to extensive committee discussion and public comment. They pointed out, for example, that the language of the proposed motion could create practical problems because it deleted the specific limitation in the current rules on locally imposed requirements of form.

Some participants suggested that it would be better to have a single, coordinated local rules initiative conducted under the direction of the Standing Committee, rather than have the five advisory committees each undertake their own efforts. One member added that the ultimate goal of the committees might be to prepare a set of proposed model local rules.

The committee voted 6-5 to defeat Judge Wilson's motion.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the style subcommittee would proceed to prepare a restyled draft of the body of criminal rules for initial consideration by the advisory committee. He added that the style subcommittee was not considering an effort to restyle any other set of rules until the Supreme Court has acted on the restyled appellate rules.

In the interim, as amendments and new rules are proposed by any of the advisory committees, the style subcommittee would continue with the procedure that has been in place. That is, once the reporter drafts an amendment or new rule, it will be submitted to the Rules Committee Support Office of the Administrative Office. That office will then provide copies to all members of the style subcommittee. The subcommittee members will have 10 days to submit their comments to Mr. Garner, who will review them and contact the reporter of the appropriate advisory committee with the collective views of the style subcommittee. The reporter will then edit the suggestions provided by the style subcommittee and return a revised draft to the Administrative Office for transmission to the advisory committee members.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte presented the report of the Technology Subcommittee, which was set forth in his report and attachments of December 5, 1997. (Agenda Item 11)

Rules Issues Raised by Technology

He reported that the subcommittee was in the process of gathering information on the interrelationship between technology and the rules. He said that Judge Stotler had asked each of the advisory committees to identify for the subcommittee any future rules amendments that they were considering to take account of advances in automation.

He noted that the advisory committees had responded by pointing to such topics as the filing of briefs on disk, electronic case filing generally, electronic service of notices and other documents, taking of testimony from remote locations, discovery of information contained in electronic format, publication and citation of opinions in electronic form, and including electronic materials in the various definitions contained in the rules.

Mr. Lafitte said that electronic case filing and the serving of notices by electronic means appeared to be the most significant matters to be addressed. He noted that several electronic case file prototypes had been established in the federal courts, and the Administrative Office was monitoring the information gathered in the pilot courts.

Mr. McCabe stated that the Administrative Office had been in regular contact with the pilot courts and had obtained and analyzed copies of their local rules. Judge Stotler added that the chart that the Office of Judges Programs had prepared on these rules was very helpful, and that the committee should also be provided with copies of the local rules governing the pilot programs.

Receiving Rules Comments on the Internet

Mr. Lafitte reported that his subcommittee was also examining whether to permit public comments on proposed rules amendments to be sent to the Administrative Office electronically. He had asked the Administrative Office to provide the subcommittee with the pros and cons of permitting the public to use the Internet to submit comments on the rules. The most significant benefit cited by the Administrative Office was that it would make it easier for the public to comment, thereby furthering the rules committees' policy of reaching out to the bar and encouraging more comments on proposed amendments. A disadvantage of electronic comments would be that many of them may be less thoughtful than written comments. Another disadvantage would be that any significant increase in the number of comments might place an intolerable burden on the reporters.

Mr. Lafitte said that the subcommittee expected to receive the views of the advisory committees on this proposal. It would then make recommendations to the Standing Committee at its June 1998 meeting. He added that the informal responses he had received to date had been very favorable toward receiving comments electronically.

ELECTRONIC CASE FILES DEMONSTRATION

Karen Molzen, law clerk to Chief Judge Conway of the United States District Court for the District of New Mexico, presented a demonstration of the electronic case file systems being piloted in the District of New Mexico and nine other federal district and bankruptcy courts. Mr. McCabe pointed out that electronic filing raises a number of important procedural issues that had not yet been addressed by the federal rules. He added that the pilot courts were filling in the gaps in the national rules, where necessary, by provisions in their local rules and by obtaining consent of the parties.

FORUM ON COMMITTEE PRACTICES AND PROCEDURES

Judge Stotler asked the members to reflect on the committee's December 1995 *Self-Study of Federal Judicial Rulemaking,* to comment on the way the committees were currently conducting their business, and to provide a retrospective look at changes occurring in the rules process during their service on the committees.

She pointed out that the volume of materials sent to the Standing Committee had increased substantially, and it was very important for every member to be made aware of all developments in the rules process. She said that it was incumbent upon the members to read the material promptly and identify any matters with which they disagree. She recommended that any member of the Standing Committee who has a concern with the substance or language of any amendment call the chair or reporter of the appropriate advisory committee in advance of the Standing Committee meeting to address or correct the proposal. In that way, the Standing Committee's meeting can be devoted to discussing the merits of proposals.

She also suggested that the committees should propose changes in the rules only when amendments are essential. They should also ensure that they are carefully considered and well drafted because they are scrutinized by the bench and bar, the Judicial Conference, the Supreme Court, and the Congress. She noted that lawyers and judges use the rules on an everyday basis and are generally comfortable with them. Many tend to react negatively to changes, particularly if they are viewed as nonessential. Accordingly, the rules committees should appraise the value of any proposed change against the anticipated opposition. In addition, the committees need to strike the correct balance between the need for national uniformity and legitimate local variations.

Following the custom of having retiring members provide a retrospective view of their service on the committee, Judge Easterbrook noted that when he started on the committee six years earlier, its procedures had been very different. An advisory committee would bring a proposed amendment to the committee's attention and be asked to provide little description. The committee's ensuing discussion would mix both substance and style, and a good deal of time would be spent in making language improvements.

He said that the Standing Committee's procedures had changed materially for the better, thanks in large part to the *Self-Study* and the leadership of the current chair. He added that the committee had also profited greatly from the work of its style consultant, Bryan Garner, and the style subcommittee. The Standing Committee, he said, had concluded that it was simply too difficult to draft language in large groups. Rather, style and expression problems are best resolved by having the members speaking directly to the advisory committee. The alternative was for the Standing Committee — as a reviewing body — to remand an amendment to an advisory committee, rather than attempt to rewrite it. On this point, Judge Stotler pointed out that the committee's *Self-Study* stated specifically that the

advisory committees have the responsibility for drafting amendments and that the Standing Committee should normally remand rules, rather than redraft them.

One of the participants concurred that style matters used to take up much of the time of Standing Committee meetings, but now are normally handled in advance of the meetings. He thanked Judge Keeton for appointing a style subcommittee, which, he said, had produced standard style conventions and worked closely with the advisory committees. He emphasized that the advisory committees were uniformly producing substantially improved drafts. Several other members expressed their support for the style process and stressed the need for consistent usage in the rules.

Judge Easterbrook added that the agendas of the Standing Committee had improved, as a wider variety of matters had been included, and members are now given greater opportunities to raise policy issues. He also pointed out that the Standing Committee had coordinated the promulgation of a number of common provisions in the various sets of federal rules and had placed certain policy matters on the agendas of the advisory committees. It had also fostered better communications among the reporters and the advisory committees and should continue to play a coordinating role with the advisory committees.

Judge Stotler stated that the work of the Rules Committee Support Office had increased greatly, and others added that the staff had been instrumental in fostering enhanced relations with the state bars. Chief Justice Veasey said that he would like to see a strengthening of the process of providing state courts with timely information of proposed changes in the rules, particularly rules that the state courts are likely to adopt. He said that state courts commonly only consider the merits of a rule after it has been adopted in the federal courts. He mentioned that he intended to discuss this matter with the Conference of Chief Justices.

One of the participants said that there was a large gap between the time a proposed amendment is published for public comment and the time it is adopted as a rule, often with changes. He suggested that interim notice of actions taken by the Standing Committee and the Judicial Conference would be very helpful. Chief Justice Veasey suggested that notice of rules developments might be sent electronically to the states.

One of the reporters stated that the work of the advisory committee chairs and reporters had increased enormously. He expressed appreciation for the procedural improvements of the last few years, which had resulted in better communications, guidance, and coordination.

Several members stated that the rules process was excellent and needed to be protected. They said that despite recurring legislative attempts in every Congress to amend rules directly by statute, Congress in fact defers in most cases to the rules process.

Judge Stotler pointed out that one of the recommendations in the *Self-Study* was to ask the Chief Justice to consider making the chairs of the advisory committees voting members of

the Standing Committee. She said that the Standing Committee had not made a recommendation on the matter and might wish to give the matter further thought.

SUPPORT SERVICES

The committee approved the following motion made by Judge Wilson:

> **We resolve to acknowledge the excellent support of the Administrative Office for the work of the rules committees— all six — and especially the devotion to duty shown by Peter McCabe, our Secretary, Chief John K. Rabiej, Attorney-Advisor Mark Shapiro, and the entire distinguished staff of the Rules Committee Support Office. Further, the Chair of the Committee is instructed to so report to the Director of the Administrative Office.**

Judge Stotler thanked Professor Coquillette and the reporters of the advisory committees for the enormous amount of quality work that they produce.

NEXT COMMITTEE MEETINGS

The committee voted to hold its next meeting, scheduled for Thursday and Friday, June 18 and 19, 1998, in Santa Fe, New Mexico.

The committee scheduled the following meeting for Thursday and Friday, January 7 and 8, 1999, with a location to be determined later.

Respectfully submitted,

Peter G. McCabe,
Secretary

Agm 3A

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 14, 1998

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Legislative Report*

We are monitoring 25 bills and three joint resolutions, which were introduced in the 105th Congress, that affect the Federal Rules of Practice and Procedure. These bills include seven new bills that were introduced after the committee's January 1998 meeting. On behalf of the rules committees, eight letters were sent to the House and Senate Judiciary committees expressing rules-related concerns and identifying drafting problems with pending legislation that involved the following issues:

- Criminal Rule 46(e) — forfeiture of bail bonds
- Civil Rule 23(f) — class action certification interlocutory appeal
- Civil Rule 30(b) — stenographic recording of depositions
- Criminal Rule 6 — grand jury size
- Civil Rule 81 — copyright rules
- 28 U.S.C. § 2071 — local rules governing alternative dispute resolution procedures
- Civil Rule 26(c) — protective orders
- Reassignment of Judge — impact on complex litigation

In addition, Judge Davis testified on pending legislation that would amend Criminal Rule 46 regarding the forfeiture of bail bonds and Judge Scirica testified on class actions at separate Congressional hearings. Written statements were submitted for both hearings. Copies of each of the letters and the written statements are attached.

The second session of the 105th Congress is nearing its end. Congress tentatively plans to adjourn on October 9, 1998. The August recess extends from early August to September 8. Accordingly, Congress has little time remaining to pass legislation. On the other hand, Congress usually passes a substantial number of bills in the waning months of its second sessions. At the moment, we are especially monitoring four key rules-related bills, which have gone beyond the initial legislative stages.

H.R. 1352 was introduced by Senator Grassley and was reported favorably by the Senate Judiciary Subcommittee on Administrative Oversight and the Courts. The bill would undo the 1993 amendments to Civil Rule 30, which presently provides parties with the discretion to use different means of recording depositions. Under the bill, only stenographic recording would be permitted absent court order or the parties' stipulation. The bill enjoys bi-partisan support. Importantly, Senator Leahy, as the ranking minority member on the Senate Judiciary Committee, is a sponsor.

The "Judicial Reform Act of 1998" (H.R. 1252) was passed by the House of Representatives on April 23, 1998. No hearings have yet been scheduled before the Senate. The bill includes several rules-related matters. Section 3 of the bill would amend § 1292 of title 28, United States Code, and is intended to accomplish basically the same things as the new Civil Rule 23(f), which was approved by the Supreme Court and transmitted to Congress in late April. Section 6 allows a district court judge to permit the televising of civil and criminal case proceedings, including trials, under guidelines promulgated by the Judicial Conference. Finally, section 12 provides for the sunset of 28 U.S.C. § 471, which required the courts to prepare civil justice expense and delay reduction plans. (Civil Justice Reform Act)

Senate Joint Resolution 44 is a bi-partisan resolution that proposes a constitutional amendment that would guarantee certain victim's rights. Among other things, victims would be entitled to reasonable notice of all public proceedings relating to the crime. The resolution has over 40 sponsors. As an alternative to the resolution's constitutional amendment, several other bills were introduced that amend the rules or pertinent statutes.

The "Bankruptcy Reform Act of 1998" (H.R. 3150) was introduced by Representative Gekas on February 3, 1998. It is the most prominent bill among others introduced in response to the National Bankruptcy Commission's report and recommendations. The bill includes several provisions that would require the rules committees to consider amending several Bankruptcy Rules.

A chart showing the status of the rules-related bills is attached.

Mark D. Shapiro
for John K. Rabiej

Attachments

LEGISLATION AFFECTING
THE FEDERAL RULES OF PRACTICE AND PROCEDURE
105th Congress

SENATE BILLS

S. 3 Omnibus Crime Control Act of 1997

- Introduced by: Hatch and others
- Date Introduced: January 21, 1997
- Status:
- Provisions affecting rules
  - *Sec. 501.* Increase the number of government peremptory challenges from 6 to 10 **[CR24(b)]**
  - *Sec. 502.* Allow for 6 person juries in criminal cases upon request of the defendant, approval of the court, and consent of the government **[CR23(b)]**
  - *Sec. 505.* Requires an equal number of prosecutors and defense counsel on all rules committees **[§ 2073]**
  - *Sec. 713.* Allow admission of evidence of other crimes, acts, or wrongs to prove disposition toward a particular individual **[EV404(b)]**
  - *Sec. 821.* Amends the language of CR35(b) (Reduction of Sentence) and the sentencing guidelines **[CR35(b)]**
  - *Sec. 904.* Amends the statute governing proceedings in forma pauperis **[AP Form 4]**

S. 79 Civil Justice Fairness Act of 1997

- Introduced by: Hatch
- Date Introduced: January 21, 1997
- Status: Referred to Committee on the Judiciary — letter from Standing Committee to Hatch (4/29/97)
- Provisions affecting the Rules:
  - *Sec. 302* Amends Evidence Rule 702 regarding expert testimony **[EV702]**
  - *Sec. 302* Amends Civil Rule 68 regarding offers of judgment **[CV68]**

S. 225 Sunshine in Litigation Act of 1997

- Introduced by: Kohl
- Date Introduced: January 28, 1997
- Status: Referred to Committee on the Judiciary — letter from Standing Committee to Hatch (4/1/97)
- Provisions affecting rules
  - *Sec. 2* Adds a new section to title 28 controlling procedures for entering and modifying protective orders **[CV26(c)]**

S. 254 Class Action Fairness Act of 1997

- Introduced by: Kohl
- Date Introduced: January 30, 1997
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules
    - *Sec. 2* requires class counsel to serve, after a proposed settlement, the State AG and DOJ as if they were parties to the class action. A hearing on the fairness of the proposed settlement may not be held earlier than 120 days after the date of that service. **[CV23]**

S. 400 Frivolous Lawsuit Prevention Act of 1997

- Introduced by: Grassley
- Date Introduced: March 5, 1997
- Status: Referred to Committee on the Judiciary; Subcom. on Oversight and the Courts
- Provisions affecting rules:
    - Section 2 amends Civil Rule 11(c) removing judicial discretion not to impose sanctions for violations of rule 11. **[CV11]**

S. 1081 Crime Victim's Assistance Act

- Introduced by: Kennedy and Leahy
- Date Introduced: July 29, 1997
- Status: Referred to ?
- Provisions affecting rules:
    - Section 121 would amend Criminal Rule 11 by adding a requirement that victims be notified of the time and date of, and be given an opportunity to be heard at a hearing at which the defendant will enter a plea of guilty or nolo contendere. **[CR11]**
    - Section 122 would amend Criminal Rule 32 to provide for an enhanced victim impact statement to be included in the Presentence Report. Victims should be notified of the preparation of the Presentence Report and provided a copy. **[CR32]**
    - Section 123 would amend Criminal Rule 32.1 by requiring the Government notify victims of certain crimes of preliminary hearings on revocation or modification of probation or supervised release. The victims will also be given the right of allocution at those hearings. **[CR32.1]**
    - Section 131 would amend Evidence Rule 615 to add victims of certain crimes to the list of witnesses the court can not exclude from the court room.**[EV615]**

S. 1352 Untitled

- Introduced by: Grassley
- Date Introduced: October 31, 1997
- Status: Referred to Committee on the Judiciary — letter from Civil Rules Committee to Hatch (4/17/98)
    - 4/2/98 Approved by Subcom. on Oversight and Courts; Sent to full committee
- Provisions affecting rules
    - amends Civil Rule 30 restoring stenographic preference for recording depositions

S. 1721 Untitled

- Introduced by: Leahy
- Date Introduced: March 6, 1998
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules
    - requires the Judicial Conference to review and report to Congress on whether the FRE should be amended to create a privilege for communications between parents and children

S. 1737 Taxpayer Confidentiality Act

- Introduced by: Mack
- Date Introduced: March 10, 1998
- Status: Referred to Committee on Finance; included in the IRS restructuring Bill marked-up on 3/31/98 (HR 2676); HR 2676 passed the senate on 5/7/98
- Provisions affecting rules
    - Amends the Internal Revenue Code to apply attorney-client privilege to communications between a taxpayer and any authorized tax practitioner (CPA, Enrolled Agent, etc) in noncriminal matters before the IRS and in federal court

S. 2030 Grand Jury Due Process Act

- Introduced by: Bumpers
- Date Introduced: May 4, 1998
- Status: Referred to Committee on Judiciary
- Provisions affecting rules
    - Would amend CR 6 [The Grand Jury] to allow witnesses before the grand jury the assistance of counsel while in the grand jury

S. 2083 Class Action Fairness Act of 1998

- Introduced by: Grassley and Kohl
- Introduced on: May 14, 1998
- Status: Referred on 5/15/98 to Judiciary Subcommittee on Oversight and Courts
- Provisions affecting rules
    - Limits attorney fees in class actions to a reasonable percentage of damages actually paid; general removal of class actions from state to federal courts; undoes

1993 amendments to Civil Rule 11 and requires sanction for frivolous filing **[CV11]**

HOUSE BILLS

H.R. 660 Untitled

- Introduced by: Canady
- Date Introduced: February 10, 1997
- Status: Referred to Committee on the Judiciary; letter from Standing Committee to Canady (4/1/97); Judge Niemeyer met with and discussed bill with Canady on 4/29/97
- Provisions affecting rules
  - *Sec. 1* would amend title 28 to allow for an interlocutory appeal from the decision certifying or not certifying a class **[CV23]**

H.R. 903 Alternative Dispute Resolution and Settlement Encouragement Act

- Introduced by: Coble
- Date Introduced: March 3, 1997
- Status: Letter to Hyde from Standing Committee (4/21/97)
- Provisions affecting rules:
  - Section 3 Amends title 28 to provide an offer of judgment provision **[CV68]** and
  - Section 4 amends Evidence Rule 702 governing expert witness testimony. **[EV702]**

H.R. 924 Victim Rights Clarification Act

- Introduced by: McCullum
- Date Introduced: March 5, 1997
- Status: Passed and signed into law.(Pub. L. No. 105-6)
- Provisions affecting the rules:
  - Adds new section 3510 to title 18 that prohibits a judge from excluding from viewing a trial any victim who wishes to testify as an impact witness at the sentencing phase of the trial. **[EV 615]**

H.R. 1252 Judicial Reform Act of 1997

- Introduced by: Hyde
- Date Introduced: April 9, 1997
- Status: 4/23/98 passed House; 4/24/98 referred to Senate—Letter from Civil Rules Committee to Hatch, re: Section 3 (5/7/98)
- Provisions affecting rules:
  - Section 3 amends title 28, section 1292(b), and would provide for interlocutory appeal of a class action certification decision. **[CV23]**
  - Provides discretion to judge to televise civil and criminal case proceedings, including trials

- Sunsets provision governing CJRA plans

H.R. 1280 Sunshine in the Courtroom Act

- Introduced by: Chabot
- Date Introduced: April 10, 1997
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules:
  - Enacts a stand alone statute that would authorize the presiding judge to allow media coverage of court proceedings. Authorizes the Judicial Conference to promulgate advisory guidelines to assist judges in the administration of media coverage. **[CR53]**

H.R. 1492 Prisoner Frivolous Lawsuit Prevention Act of 1997

- Introduced by: Gallegly
- Date Introduced: April 30, 1997
- Status: Referred to Committee on the Judiciary, Subcommittee on Crime
- Provisions affecting rules:
  - Would amend Civil Rule 11 to mandate imposition of a sanction for any violation of Rule by a prisoner. **[CV11]**

H.R. 1536 Grand Jury Reduction Act

- Introduced by: Goodlatte
- Date Introduced: May 6, 1997
- Status: Referred to Committee on the Judiciary — CACM considered proposal 6/97; referred to ST, rec'd that Judicial Conference oppose the legislation; Rec. Approved 3/98; letter sent by Conference Secretary to Goodlatte (4/17/98)
- Provisions affecting rules:
  - Would amend Section 3321 of title 28, reducing the number of grand jurors to 9, with 7 required to indict. **[CR6]**

H.R. 1745 Forfeiture Act of 1997

- Introduced by: Schumer on behalf of the Administration —
- Date Introduced: May 22, 1997
- Status: Referred to Judiciary and Ways and Means
- Provisions affecting rules:
  - Several including §§102 and 105 directly amending Admiralty Rules and § 503 creating a new Criminal Rule 32.2 on forfeiture and related conforming amendments to other criminal rules **[CR32.2]**

H.R. 1965 (formerly H.R. 1835) *Civil Asset Forfeiture Reform Act*

- Introduced by: Hyde and Conyers
- Date Introduced: June 20, 1997
- Status: Reported to the House, 10/30/97; Letter with Judiciary's comments being coordinated by LAO; including concerns about time deadlines in admiralty cases

- Provisions affecting rules:
  - Section 12(b) amends Paragraph 6 of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims (extends the notice requirement from 10 days to 20).

H.R. 2603 (became H.R.3528) *Alternative Dispute Resolution and Settlement Encouragement Act*

- Introduced by: Coble and Goodlatte
- Date Introduced: October 2, 1997
- Status: Hearings held by Subcommittee on Courts and Intellectual Property, 10/9/97
- Provisions affecting rules:
  - Section 3 would amend § 1332 of title 28, United States Code, to provide for awarding reasonable costs, including attorneys' fees, if a written offer of judgment is not accepted and the final judgment is not more favorable to the offeree than the offer. The provision would not apply to claims seeking equitable remedies.
  - Alternative bill suggested by DOJ that would call it to play local rules.
  - Require each court to make available 1 form of ADR; mandatory Court- annexed Arbitration is not one of the options

H.R. 3150 Bankruptcy Reform Act of 1998

- Introduced by: Gekas
- Introduced: February 3, 1998
- Status: 4/23/98 to Full Committee
- Provisions affecting rules: several provisions request the bankruptcy rules committee to propose for adoption rules or forms to implement statutory changes

H.R. 3396 Citizens Protection Act of 1998

- Introduced by McDade
- Introduced on March 5, 1998
- Status: referred on 3/5/98 to full Judiciary Committee (131 co-sponsors as of 5/18/98)
- Subject government lawyers to attorney conduct rules established by State laws or rules

H.R. 3577 Confidence in the Family Act

- Introduced by: Lofgren
- Date Introduced: March 27, 1998
- Status: Referred to Judiciary; attempt to add to HR 1252 failed
- Provisions affecting rules:
  - would amend **EV501** by adding a new section creating a privilege for communications between parents and children

H.R. 3789 Class Action Jurisdiction Act of 1998

- Introduced by: Hyde
- Date Introduced: May 5, 1998

- Status: Referred to Judiciary;
- Provisions affecting rules:
  - The bill would give the federal courts original jurisdiction in class actions in diversity cases without regard the value of the item in controversy and provide for removal of all class actions from state courts

Joint Resolutions

S.J. Res. 6 (See also S.J 44, H.J. Res 71, & HR 1322)
- Introduced by: Kyl and Feinstein
- Date Introduced: January 21, 1997
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules:
  - Victim's rights **[CR32]**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

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May 7, 1998

Honorable Bill McCollum
Chairman, Subcommittee on Crime
Committee on the Judiciary
United States House of Representatives
207 Canon House Office Building
Washington, D.C. 20515

Dear Chairman McCollum:

I write to advise you that at its April 27-28, 1998 meeting the Judicial Conference's Advisory Committee on Criminal Rules considered the proposed amendment to Criminal Rule 46(e) contained in H.R. 2134, the "Bail Bonds Fairness Act of 1997." Under Rule 46(e), a court may forfeit a bail bond if a defendant violates a condition of release that had been made part of the bail bond. The proposed amendment would permit a court to forfeit a bail bond only if the "defendant fails to appear as required" by the bond. The committee declined to recommend amendment of the rule at this time.

United States magistrate judges are the front-line judicial officers who ordinarily conduct proceedings governing the pretrial release of defendants. The committee informally surveyed about 80 federal magistrate judges in 22 district courts. As a preliminary matter, the survey responses supported anecdotal evidence that federal courts infrequently use corporate sureties. Instead, the courts most often release a defendant on personal recognizance, or when a family member or a friend deposits 10% of the amount of the bond, posts personal property, or signs an unsecured bond on behalf of the defendant.

The committee found that in a majority of the district courts that responded to the survey, bail bonds are forfeited only if the defendant fails to appear as required by the bond. In the other districts, however, courts have incorporated conditions of release as part of the bail bond and forfeited bail bonds for violations of those release conditions. In these districts, the magistrate judges strongly believe that holding a relative's or friend's assets at risk significantly increases the probability that the defendant will comply with all the release conditions.

Holding a defendant's parents or friends responsible as guarantors improves the likelihood that the defendant will comply with release conditions for two principal reasons. First, a parent or friend has a greater incentive to ensure that a defendant abides by all the release

conditions. Second, the defendant has a greater incentive to comply with the release conditions and not jeopardize the property of a parent or a friend. Absent this type of guarantee, a magistrate judge would be more reluctant to release a particular defendant. And in these cases, a magistrate judge might well decide to retain the defendant in custody rather than expose the court to the risk that the defendant will violate a significant release condition, e.g., refrain from drug use.

The committee discussed the concerns of the magistrate judges and concluded that the present practices were appropriate. Rule 46(e) provides judges with the valuable flexibility to impose added safeguards ensuring a defendant's compliance. The forfeiture of a bail bond for a violation of a condition of release has been uniformly upheld by the courts. No problem with the existing practices has been brought to the committee's attention other than from the bail bondsmen. On balance, the committee determined that the current practice should be retained.

I appreciated the opportunity to appear before your subcommittee in March. I hope that the reasons for the actions of the advisory committee on this issue are useful to you. If you would like to discuss any of these issues at greater depth, I am available at your convenience.

Sincerely yours,

W. Eugene Davis
United States Circuit Judge

cc: Subcommittee on Crime,
Committee on the Judiciary

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May 7, 1998

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
131 Senate Russell Office Building
Washington, D.C. 20510-6275

Honorable Patrick Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
1351 Senate Hart Office Building
Washington, D.C. 20510-6282

Dear Mr. Chairman and Senator Leahy:

On April 24, 1998, the Supreme Court of the United States entered an order approving amendments to the Federal Rules of Practice and Procedure, including a new Civil Rule 23(f). The new rule provides a court of appeals with discretion to review an interlocutory appeal of an order denying or granting class action certification. Under the Rules Enabling Act, the amendments have been forwarded to Congress and will take effect on December 1, 1998, unless Congress acts otherwise.

The House of Representatives passed H.R. 1252, the "Judicial Reform Act" on April 23, 1998, and it was referred to your committee on April 24, 1998. Section 3 of the Act would accomplish substantially the same thing as new Rule 23(f) as approved by the Supreme Court, but it would do so by amending § 1292(b) of title 28, United States Code. I urge you and your colleagues on the Committee on the Judiciary to oppose § 3 of H.R. 1252. I do not address the concerns that the Judicial Conference may have with the other provisions of the Act.

Although § 3 of H.R. 1252 is intended to accomplish the same purpose as new Rule 23(f), it suffers from some drafting problems. For example, by authorizing a party's appeal of a determination that the action can be "maintained as a class action," § 3 introduces an element of ambiguity that is not found in new Rule 23(f), which authorizes the appeal more precisely on an order of court that grants or denies class action certification. Moreover, revising title 28 to do basically the same thing as the new Rule 23(f) but using slightly different language introduces unnecessary confusion and will surely generate satellite litigation.

In 1992, Congress invited the Supreme Court to prescribe rules specifying which types of district court orders should be subject to an interlocutory appeal, other than those specified under the statute. (Federal Courts Administration Act of 1992 (Pub. L. No. 102-572).) In accordance with that Act, the Court has now adopted new Rule 23(f), but only after the rule had gone through the exacting rulemaking process. Before approval, the rule was published for public comment, hearings were held before the Advisory Committee on Civil Rules, and it was reviewed and approved by the Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court. It now lies before the Congress and is scheduled to take effect in several months.

The elimination of § 3 from H.R. 1252 would not frustrate the purpose of the "Judicial Reform Act." But its deletion would further the policies of the "Federal Courts Administration Act of 1992" and the longstanding "Rules Enabling Act" rulemaking process that has previously been established by agreement of Congress and the courts. For these reasons, I urge you and your committee colleagues to decline to include § 3 in the "Judicial Reform Act."

Thank you for your consideration.

Sincerely yours,

Paul V. Niemeyer
United States Circuit Judge

cc: Committee on the Judiciary,
United States Senate
Honorable Charles Canady

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

April 17, 1998

Honorable Robert W. Goodlatte
United States House of Representatives
123 Cannon House Office Building
Washington, D.C. 20515-4606

Dear Representative Goodlatte:

As an initial matter, I would like to thank you for deferring your action on the proposal in H.R. 1536 to reduce the size of grand juries until the judiciary had the opportunity to consider the issue in the context of the Rules Enabling Act rulemaking process. I also wish to emphasize that four full committees of the Judicial Conference of the United States reviewed the proposal, including the Committee on Criminal Law, the Committee on Court Administration and Case Management, the Advisory Committee on Criminal Rules, and the Standing Committee on Rules of Practice and Procedure, all of which noted both the proposal's possible economic benefits and likely burdens. After careful review, the Conference decided to oppose the legislation concluding that the disadvantages of the proposal outweigh the potential cost savings.

The proposal is opposed for the following reasons, most of which focus on the role the grand jury has served in our judicial system since the founding of our nation:

- First, the present size of the grand jury significantly increases the statistical probability of having a more diverse cross-section of the community represented. Larger grand juries are more likely to include persons from different occupational, economic, racial, religious, and ethnic backgrounds than smaller grand juries. The proposed reduction in this diversity of viewpoints would weaken the very hallmark of effective and meaningful grand jury deliberations, which are intended to reflect the collective community's conscience.

- Second, reducing the size of the grand jury would increase the likelihood that one strong or disruptive juror would dominate deliberations. It is clearly more difficult to dominate 23 people than nine, making the larger body more likely to reach an equitable and principled decision.

- Third, a smaller grand jury is much more likely to yield run-away prosecutions. Given the near limitless potential scope of a grand jury inquest, the balanced perspective of a larger group may prove critical.

- Lastly, smaller grand juries reduce the number of citizens that are given the opportunity to participate in a critical task under our Constitution. In these days of increased public apathy and cynicism, opportunities for citizens to participate in government are precious as the success of our justice system is dependent on the consent of the citizenry. And, most participants find the experience of serving on a grand jury quite positive.

Although we can not support H.R. 1536, we certainly appreciate all the support you have provided to the Judicial Conference over the years. If you would like to discuss any of these issues at greater depth, I am available at your convenience at 273-3000.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable W. Eugene Davis

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April 17, 1998

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
131 Senate Russell Office Building
Washington, D.C. 20510-6275

Dear Mr. Chairman:

As chair of the Advisory Committee on Civil Rules and on behalf of the Judicial Conference of the United States, I am writing to express opposition to S. 1352, which would undo the amendments to Rule 30(b) that took effect on December 1, 1993. The bill would reinstate the former provisions of the rule to require stenographic recording of all oral depositions unless otherwise ordered by the court or stipulated by the parties. It establishes an unjustified preference for stenographic recording at the expense of other equally qualified—and often less costly—recording means.

The 1993 amendments to Rule 30 took effect after two lengthy rounds of public hearings and the review of hundreds of comments. In this thorough, deliberative process, all points of view, including the views of stenographic organizations, were heard and considered and all relevant considerations were carefully balanced. Only after the conclusion of this exacting process did the Judicial Conference and the Supreme Court affirmatively approve the amended rule and submit it to the Congress, which took no action to defer it.

Passage of S. 1352 would effectively repudiate the well-considered judgment of the rules committees, Judicial Conference, and Supreme Court, whose judgment was reviewed and left undisturbed by the Congress in 1993. Since then, the Committee on Rules of Practice and Procedure has received no notification from any source suggesting any problem with the amended rule. Nor is it aware of any new arguments or other grounds that have not been previously considered. I urge you to decline to support this bill, which would frustrate the Rules Enabling Act rulemaking process that has been previously established by agreement of Congress and the courts.

The bill has three major shortcomings: it significantly reduces the flexibility of litigants to select the most efficient and economical method of recording depositions; it is based on a

faulty assumption regarding the utility of the various methods of recording a deposition; and it amends the federal rules outside the Rules Enabling Act process.

The proposed legislation would substantially limit the options available to litigants. As now written, Federal Rule of Civil Procedure 30 permits a party taking a deposition to record it by sound, sound-and-visual, or stenographic means, without seeking the approval of the court or the consent of other parties. The rule provides litigants with the flexibility to choose the recording mechanism that will best serve their requirements, which often vary because most depositions are used only for discovery purposes and not at trial. Moreover, it permits them to explore less-expensive options, which is critical in these times of upward spiraling litigation costs. I might add, as an aside, that our committee is currently exploring other methods to reduce the cost of discovery in civil litigation — a goal that we think worthy. Finally, the current rule accommodates parties who wish to use newer methods in the ever changing area of litigation technology.

Moreover, the legislation appears based on the belief that audio recording and other non-stenographic forms of recording are too unreliable, a contention that the Advisory Committee on Civil Rules concluded in recommending the 1993 amendments to Rule 30 did not withstand scrutiny. Although stenographic recording has served the courts admirably for decades, that by no means implies that other methods cannot be equally effective. Although Rule 30 only deals with methods of recording depositions, audio recording is a normal means of taking the official record in federal court proceedings, particularly in appellate and bankruptcy courts, and is similarly relied upon in Congressional hearings. Further, although no method of taking a record is absolutely fool-proof, there is no empirical evidence that stenographic reporting is any more reliable than the alternative methods. There are numerous cases cited under Federal Rule of Appellate Procedure 10 dealing with the difficulties of reconstructing the record when the method of taking the record fails; these cases include failures with both stenographic and non-stenographic record taking.

Perhaps most significantly, Rule 30 includes safeguards that insure the integrity and utility of any tape or other non-stenographic recording. Specifically, Rule 30:

- requires the officer presiding at the deposition to retain a copy of the recording unless otherwise ordered or stipulated;
- requires the presiding officer to state required identification information at the beginning of each unit of tape or other medium;
- prohibits the distortion of the appearance or demeanor of the deponents or counsel;
- acknowledges the court's authority to require a different recording method if warranted under the circumstances;

- permits the other party to designate an additional method for recording the deposition; and

- requires the parties to provide a written transcript if they intend to use a deposition recorded by non-stenographic means for other than impeachment purposes at trial or a motion hearing.

In addition, the legislation deals with a subject best analyzed under the Rules Enabling Act process. In enacting the Rules Enabling Act, Congress concluded that rules of court procedure were best promulgated by the judiciary in a deliberative process. The advantages of such a process are clear in this case.

In conclusion, I hope that you recognize the inherent problems with S. 1352 and oppose it. If you would like to discuss any of these issues at greater depth, I am available at your convenience.

Sincerely,

Paul V. Niemeyer
United States Circuit Judge

cc: Committee on the Judiciary,
Unites States Senate

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Chambers of
PAUL V. NIEMEYER
United States Circuit Judge

(410) 962-4210
Fax (410) 962-2277

April 14, 1998

Honorable Howard Coble
Chairman, Subcommittee on Courts
and Intellectual Property
Committee on the Judiciary
United States House of Representatives
B351A Rayburn House Office Building
Washington, DC 20515

Dear Chairman Coble:

Last fall, you wrote me, expressing concern over our proceeding with a proposal before the Civil Rules Advisory Committee to delete language in Rule 81(a)(1), which provides that the civil rules do not apply to copyright proceedings. The reason for our addressing the issue was to conform to the current practice of copyright practitioners and judges who have been applying the federal rules to copyright proceedings. Because you had legislation pending on copyrights and our Committee did not wish to interfere unwittingly in your effort, we postponed action on the proposal before us until our spring meeting.

When we discussed this matter with your staff before the spring meeting, your staff was most helpful in explaining your position and in coordinating our mutual concerns. Even though you had no substantive difficulty with the proposal before us, you remained concerned about unintended consequences of action by us at that time. Your staff asked that we keep you advised of our action, particularly if we proceeded with the proposed change to Rule 81.

After I presented the entire history of our exchanges to the Rules Committee at its spring meeting, the Committee felt unanimously that the most prudent course, in light of your concern, would be to defer consideration of the proposal before us for another six months until our fall meeting. While we understood that any action on our part would probably not interfere with the effort that you are making in pursuing copyright legislation at

this time, we nevertheless felt that our deferring at this time would serve the greatest good.

We hope that your continuing work on this subject bears fruit.

Sincerely,

Paul V. Niemeyer

PVN/pjh

cc: Mitch Glazier, Esq.
Professor Edward H. Cooper
Mr. John K. Rabiej

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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March 24, 1998

Honorable Howard Coble
Chairman, Subcommittee on Courts
and Intellectual Property
Committee on the Judiciary
United States House of Representatives
B-351A Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Coble:

I write to express concern over § 2 of H.R. 2603, the "Alternative Dispute Resolution Act of 1998," as revised, which authorizes federal courts by means of local rules to use alternative dispute resolution processes in all civil actions. Our concern is limited solely to a matter of procedure and is not based on any substantive ground. We urge you to qualify the reference to "local rule" in the instances it is used in the "Act" by adding thereafter the phrase "adopted under 28 U.S.C. § 2071(a)." This change would have no effect on the Act's substantive provisions, but it would obviate a serious institutional issue dealing with the federal judiciary's governance of practice and procedure in the courts.

We are concerned that if the "local rule" provision remains unqualified, the Rules Enabling Act process may be bypassed, denying the possibility of national, uniform rules adopted on the recommendation of standing committees, with public notice and comment, and on the approval of the Judicial Conference and the Supreme Court. Ordinarily, local rules are subject to national regulation through this process. If the qualification that we propose is not included, the structure may be undermined unwittingly, leading to confusion about any local rule's authority.

We believe that our suggestion will not frustrate the purpose of the Act and will further the long-standing enabling rules process that has previously been established by agreement of Congress and the courts.

Thank you for your consideration.

Sincerely yours,

Paul V. Niemeyer
United States Court of Appeals

cc: Honorable Barney Frank

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March 23, 1998

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
Room 2138, Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hyde:

I write to advise you of the position of the Judicial Conference's Advisory Committee on Civil Rules regarding proposed amendments to Rule 26(c) of the Federal Rules of Civil Procedure dealing with protective orders. The proposed provision would require a judge to make particularized findings of fact that information subject to a discovery request is not relevant to the protection of public health or safety before approving any protective order. I understand that the provision may be brought up for discussion during mark-up of H.R. 1252, the "Judicial Reform Act."

The advisory committee has carefully studied various proposals addressing concerns over abuses involving protective orders, including earlier versions contained in H.R. 2017 (102d Congress) and S. 1404 (103d Congress). In 1995, the advisory committee crafted a proposal that it believed would meet the concerns of the competing interests, but the proposal was returned by the Judicial Conference for further study. The advisory committee has now completed a study of the general scope and nature of discovery to identify and address its impact on litigation cost and delay. Protective orders were once again examined as part of the study.

The advisory committee continues to oppose legislation that would require a judge to make particularized findings of fact regarding the discovery materials under consideration. No change along these lines was appropriate, because the present rule already addresses in a meaningful fashion the concerns relating to public safety while at the same time balancing the competing interests of the parties to the suit. The following discussion sets out the history and reasons for the committee's conclusions.

Judiciary's Response to Concerns Regarding Protective Orders

The Advisory Committee on Civil Rules began serious study of protective order practices in November 1992 in response to pending legislation. The committee sought to inform itself whether the problems suggested by the legislation existed, and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. It also asked the Federal Judicial Center to undertake a study of protective order practice to shed light on the frequency of protective orders, the kinds of litigation in which protective orders were entered, the frequency of stipulated protective orders, and the kinds of information protected. It considered lengthy law review articles and the recommendations of the Federal Courts Study Committee.

These studies all suggested that there is no need to make it more difficult to issue discovery protective orders. The studies generally showed:

- that there is no evidence that protective orders in fact create any significant problem in concealing information about public hazards or in impeding efficient sharing of discovery information;

- that much information can be gathered from parties and nonparties during discovery that no one would have a right to learn outside the needs of a particular lawsuit;

- that discovery would become more burdensome and costly if the parties can not reasonably rely on protective orders; and

- that administration of a rule creating broader rights of public access would impose great burdens on the court system.

The advisory committee also kept in mind the wide variety of interests that are involved with protective orders. Although it is common to focus on the often legitimate needs to protect trade-secret and other confidential commercial information, protective orders often protect intensely personal privacy interests. The Federal Judicial Center study, for example, found that the most frequent use of protective orders occurs in civil rights and employment discrimination litigation. The privacy interests protected often are those of nonparties, who have had no voice in the decision whether to initiate litigation and little or no interest in the outcome. An added concern is that discovery has been designed from the very beginning to function without need of judicial supervision. Courts are not equipped to supervise the details of discovery. Voluntary exchanges of information remain indispensable. It would be counterproductive and expensive to attempt to add hurdles that impede the efficient entry of protective orders.

The advisory committee found little reason to believe that protective orders prevent desirable sharing of information in related litigation or defeat public access to information about unsafe products. Federal courts are sensitive to these issues and respond to them effectively. Perhaps more important, the advisory committee concluded that there is a better way to ensure that all courts follow present practice. Rule 26(c) can expressly provide for modification or dissolution of protective orders, including provision for modification or dissolution on motion by a nonparty.

Proposed amendments to Rule 26(c) were published for public comment in 1993. Substantial comments were made. The draft was revised in light of those comments and was published in 1995 for a second round of comment. Extensive comments were received. The advisory committee reviewed all the comments and the testimony at the public hearings on proposed Rule 26(c). Comments supporting the proposal generally show agreement that it would clarify and confirm the general and better current practice. Comments opposing the proposal, including written opposition from Senator Kohl, the sponsor of S. 1404, indicated concern about explicit recognition of the widespread use of stipulated protective orders and also continued to advocate a broad public "right to know." Many of the opposing comments suggested that it would be better to leave Rule 26(c)

unchanged. Ultimately, the proposed amendments to Rule 26(c) were returned to the advisory committee by the Judicial Conference for further study.

The advisory committee began consideration of the scope of discovery at its October 1996 meeting. A Discovery Subcommittee, chaired by Judge David F. Levi, was formed. The subcommittee met with a large group of lawyers drawn from all branches of the profession and convened a national symposium, which was held in September at the Boston College School of Law. It reviewed suggestions from the major national lawyer associations. The entire advisory committee also participated in the American Bar Association's conference on the RAND report on the Civil Justice Reform Act.

After this exhaustive study, the advisory committee continues to strongly oppose legislation that would amend Rule 26(c) to require a judge to make particularized findings of fact for every protective order request.

CONCLUSIONS

The advisory committee has determined that the instances when protective orders impede access to information that affects the public health or safety are not widespread. A number of experts on the subject have examined the commonly cited illustrations and have concluded that information sufficient to protect public health and safety has always been available from other sources. The advisory committee has studied this matter carefully and concluded that no change to the present protective-order practice is warranted. But it is important to approach whatever perceived problem there may be with care, lest discovery be made even more complex and costly. Attempts to increase access to discovery information may indeed backfire, as parties become less and less willing to exchange information without prolonged discovery litigation. It is not necessary to transform a private dispute-resolution mechanism into a public information mechanism, and doing so would have profound effects on private litigation.

For these reasons, I urge you to decline to include in the Judicial Reform Act of 1997 the proposed amendment to Rule 26(c). Thank you for your consideration.

Sincerely yours,

Paul V. Niemeyer
United States Court of Appeals

cc: Committee on the Judiciary,
United States House of Representatives

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

February 27, 1998

Representative Charles T. Canady
2432 Rayburn House Office Building
Independence Avenue, S.W.
Washington, D.C. 20515-0912

Dear Representative Canady:

I am writing regarding some concerns that I have with Section 6 of H.R. 1252 ("Judicial Reform Act of 1997"), which allows parties to move for reassignment of their case to a different judge without any showing of cause. At the outset, I would like to state that I fully support the Judicial Conference's position regarding the negative impact that Section 6 will have on routine cases. What I am writing separately to emphasize is that Section 6 will have even more dire consequences in aggregate cases, e.g., class actions and mass torts. At our recent conversation regarding class actions, it was clear that we share the view that mass tort cases should be dealt with in a manner which minimizes delay and procedural abuses. I believe that "peremptory challenges" of judges opens the way for undue delay, increased expense, and potential "judge shopping" in a variety of mass tort litigation contexts. I urge you to reconsider your position on Section 6 of H.R. 1252.

Multidistrict Litigation

As you are aware, mass tort and other complex cases are frequently consolidated solely for pretrial proceedings under the multidistrict litigation statute, 28 U.S.C. § 1407. As Section 6 by its terms only applies to a "case to be tried," it would appear not to affect MDL cases. But while most MDL cases are transferred back to their original districts for trial, it is far from unusual for the judge who has been assigned the cases for pretrial work to transfer all the cases to himself for trial, pursuant to 28 U.S.C. §1404 (for the convenience of the parties). In these cases, a preemptive challenge to the judge would be devastating. All the expertise that the judge acquired regarding the cases, developed over many months, would be lost. New judges would have to educate themselves regarding the cases, with attendant delay and expense. (I note parenthetically that the Supreme Court will examine the practice of MDL judges transferring cases to themselves in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 65 U.S.L.W. 3766 (May 19, 1997, No. 96-1482).)

Consolidated Cases

District courts frequently consolidate cases with common issues for trial, particularly in the mass tort context. Decisions to consolidate are not easy; the judge must obtain a near encyclopedic knowledge of the facts and issues and must take into account many factors regarding the parties' claims, injuries, and defenses. Under Section 6, the judge making the decision can be "removed," requiring a second judge to redo the entire process. This result has two obvious vices. First, the wasted time and expense in presenting the same facts and legal issues to a second judge. Second, and more disturbing, the moving party has "erased" the first judge's decision, and now has a second chance to litigate the issue.

Class Actions

A waste of judicial resources would also occur if a judge was reassigned after ruling on whether to certify a class, as a vast amount of judicial time and effort goes into making the determination (not to mention the expense to the parties). Further, because the decision to certify a class is often decisive, as it typically yields a settlement, the "losing" party has an especially strong incentive to use gamesmanship to get a second opportunity to litigate the certification issue before a different judge. As class certifications are not permanent, the second judge, after being presented the facts and law by the parties, is free to reach a different decision. In addition, even if the case is not reassigned, Section 6 can skew the process. A party may use the threat of a reassignment to extort settlement terms that they could not otherwise command.

Uneven Playing Field

I note that Section 6 appears to unfairly favor the side of a case with fewest parties, because "all the parties on one side" must bring the motion to reassign the case. In most mass tort cases, where there are numerous plaintiffs but only a single or small number of defendants, the defendants would have a distinct advantage in obtaining the consents necessary to transfer the case to a different judge. The degree to which this would be a problem in the class action context would depend upon whether "parties" includes class members or just named class representatives. If the former, class counsel would face the impossible task of obtaining consents from thousands (or millions) of class members.

Lack of Limits

Section 6 creates substantial uncertainty, because it is effectively open-ended. While the provision does attempt to create a presumptive baseline — the motion must be filed within 20 days of the judge being assigned and before the judge has ruled on any "substantial issue" in the case — nonetheless, exceptions effectively swallow the baseline. Regardless of whether the judge has ruled on a "substantial issue," an opportunity to reassign the case arises if: (1) a new

party is added (presumably by any mechanism, including intervention, interpleader, etc.); (2) a supplemental, amended, or third party complaint is served; or (3) a party enters a belated appearance. The potential for wasted time and resources is apparent when a judge can be reassigned after any such commonplace occurrences (which are particularly common in mass tort cases), no matter how far the case has progressed. I also note that these commonplace practices could be manipulated by a party interested in acquiring a different judge. An example of such gamesmanship would be a party who gets a favorable ruling on issue #1, but then adds a new party in hopes of getting a judge more sympathetic to his claim on issue #2.

In conclusion, I hope that you recognize the inherent problems with Section 6 and move to eliminate it from the bill. If you would like to discuss any of these issues at greater depth, I am available at your convenience.

Sincerely,

Paul V. Niemeyer
United States Court of Appeals

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette
Professor Edward H. Cooper

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 1252 AS REPORTED BY THE SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Judicial Reform Act of 1997".

SEC. 2. 3-JUDGE COURT FOR ANTICIPATORY RELIEF.

(a) REQUIREMENT OF 3-JUDGE COURT.—Any application for anticipatory relief against the enforcement, operation, or execution of a State law adopted by referendum shall not be granted by a United States district court or judge thereof upon the ground that the State law is repugnant to the Constitution, treaties, or laws of the United States unless the application for anticipatory relief is heard and determined by a court of 3 judges in accordance with section 2284 of title 28, United States Code. Any appeal of a determination on such application shall be to the Supreme Court. In any case to which this section applies, the additional judges who will serve on the 3-judge court shall be designated under section 2284(b)(1) of title 28, United States Code, as soon as practicable, and the

(b) CONFORMING AMENDMENT.—The table of contents for chapter 85 of title 28, United States Code, is amended by adding after the item relating to section 1368 the following new item:

"1869. Limitation on Federal court remedies.".

(c) STATUTORY CONSTRUCTION.—Nothing contained in this section or the amendments made by this section shall be construed to, beyond the scope of applicable law, make legal, validate, or approve the use of a judicial tax, levy, or assessment by a United States district court.

(d) EFFECTIVE DATE.—This section and the amendments made by this section apply with respect to any action or other proceeding in any Federal court that is commenced on or after the date of the enactment of this Act.

SEC. 6. REASSIGNMENT OF CASE AS OF RIGHT.

(a) IN GENERAL.—Chapter 21 of title 28, United States Code, is amended by adding at the end the following:

"§ 464. Reassignment of cases upon motion by a party

"(a) UPON MOTION.—(1) If all parties on one side of a civil case to be tried in a United States district court described in subsection (e) bring a motion to reassign the case, the case shall be reassigned to another appropriate judicial officer. Each side shall be entitled to one reassignment without cause as a matter of right.

"(2) If any question arises as to which parties should be grouped together as a side for purposes of this section, the chief judge of the court of appeals for the circuit in which the case is to be tried, or another judge of the court of appeals designated by the chief judge, shall determine that question.

"(b) REQUIREMENTS FOR BRINGING MOTION.—(1) Subject to paragraph (2), a motion to reassign under this section shall not be entertained unless it is brought, not later than 20 days after notice of the original assignment of the case, to the judicial officer to whom the case is assigned for the purpose of hearing or deciding any matter. Such motion shall be granted if—

"(A) it is presented before trial or hearing begins and before the judicial officer to whom it is presented has ruled on any substantial issue in the case, or

"(B) it is presented by consent of the parties on all sides.

"(2) Notwithstanding paragraph (1)—

"(A) a party joined in a civil action after the initial filing may, with the concurrence of the other parties on the same side, bring a motion under this section within 20 days after the service of the complaint on that party;

STATEMENT
OF
W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON

"BAIL BOND FAIRNESS ACT OF 1997"
H.R. 2134

BEFORE THE SUBCOMMITTEE
ON CRIME

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

March 12, 1998

STATEMENT

Good morning Chairman McCollum. On behalf of the Judicial Conference of the United States I wish to thank you for inviting me to appear before the Subcommittee today to discuss H.R. 2134, the "Bail Bond Fairness Act of 1997." My name is W. Eugene Davis. I am a circuit judge in the Court of Appeals for the Fifth Circuit. I chair the Judicial Conference's Advisory Committee on Criminal Rules ("advisory committee").

Under Rule 46(e)(1) of the Federal Rules of Criminal Procedure a district court shall forfeit the bail of a person who breaches a condition of bond while on release prior to trial. Rule 46(e)(2) then authorizes the district court to set aside any forfeiture. Section 2 of H.R. 2134 would amend Rule 46 and authorize a court to forfeit bail only when the "defendant fails to appear as required" by the bond. I urge you and the other members of the subcommittee to defer action on this bill and allow the rulemaking process established under the Rules Enabling Act to proceed.

Inconsistent with the Rules Enabling Act

H.R. 2134 directly amends one of the Federal Rules of Practice and Procedure. Its passage would thwart the rulemaking process established by Congress under the Rules Enabling Act, 28 U.S.C. §§2071-77. Under the Act,

proposed amendments to the federal rules are presented by the Supreme Court to Congress for approval only after being subjected to extensive scrutiny by the public, bar, and bench. As envisioned by Congress, the Rules Enabling Act rulemaking process offers a systematic review of rule proposals that is designed to identify potential problems, suggest improvements, unearth lurking ambiguities, and eliminate possible inconsistencies. The rulemaking process is laborious and time-consuming, but the painstaking process reduces the potential for future satellite litigation over unforeseen consequences or unclear provisions. It also ensures that all persons, including the public, who may be affected by a rule change have had an opportunity to express their views on it. Direct amendment of the federal rules circumvents this careful process established by Congress.

Advisory Committee Work

Rule 46(e) has not been carefully examined by the advisory committee since the rule's promulgation in 1944. The advisory committee has received no complaints or comments from the bar, bench, or public on the rule, and the committee is not otherwise aware of any problems associated with it. The advisory committee will next meet on April 27-28, 1998, in Washington, D.C. In light of Congress' interest in this matter, I will place the proposed amendment of Rule 46(e) in H.R. 2134 on the agenda of the advisory committee's meeting.

A defendant is frequently granted bail and released from detention subject to a number of conditions as authorized by 18 U.S.C. §3142. The release conditions are many and varied, and it is important that a court retain the authority —as it presently does—to ensure that a defendant complies with them. It has been my experience that when a defendant breaches a condition of release, the judge "revokes" the bail and remands the defendant to custody without "forfeiting" the bond (requiring payment by the surety). It has also been my experience that a release bond is "forfeited" only when a defendant fails to make a required appearance. Indeed, the standard appearance bond form issued by the Administrative Office of the U.S. Courts, which I believe is used uniformly by the federal courts, only obligates the surety to pay the proceeds of the bond if the defendant fails to appear. So, unless the defendant fails to appear as ordered the surety has no exposure under the standard appearance bond. A separate standard form is used that contains the various conditions of pretrial release and the governing sanctions for defendant's violations. But the surety does not sign and is not bound by those conditions, which apply solely to the defendant. Copies of each form are attached.

Rule 46(e) may need further study. But we must be careful not to unintentionally disturb the court's authority to "revoke" bail and enforce all the

conditions of release. If given an opportunity to do so, the advisory committee will focus on: (1) whether a change or clarification in Rule 46(e) is justified; and (2) if so, whether we should expand the specific language proposed in H.R. 2134 to Rule 46(e) to make it clear that the court has the authority to "revoke" bail for failure to comply with any release condition as well as the authority to forfeit the bond for the defendant's failure to appear.

Conclusion

Under the rulemaking process, proposed changes are vetted and thoroughly studied and debated. Hidden problems are often discovered and brought to the attention of the advisory committee. By deferring immediate action and permitting the rulemaking process to proceed on this proposed amendment, this subcommittee and Congress will have assured itself of a well-documented record on which to make a decision once the rule change has completed its course in accordance with the Rules Enabling Act.

I look forward to continuing this dialogue with you and the other members of the subcommittee. I would be happy to answer any questions that you may have. Thank you.

STATEMENT
OF
ANTHONY J. SCIRICA
UNITED STATES CIRCUIT JUDGE
COURT OF APPEALS FOR THE THIRD CIRCUIT

ON

CLASS ACTIONS

BEFORE THE SUBCOMMITTEE
ON COURTS AND INTELLECTUAL PROPERTY

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

March 5, 1998

STATEMENT

Thank you for inviting me to appear before the subcommittee today. I am a circuit judge in the Court of Appeals for the Third Circuit. While I am a member of the Advisory Committee on Civil Rules (advisory committee) of the Judicial Conference of the United States, I wish to note that my comments here have not been approved by the Committee and express only my own views.

With the approval of The Chief Justice, the chair of the Advisory Committee on Civil Rules, Judge Paul V. Niemeyer of the Court of Appeals for the Fourth Circuit, convened a working group consisting of members of the advisory committee and representatives from the Judicial Panel on Multidistrict Litigation and several other Judicial Conference committees to study mass torts. Judge Niemeyer asked me to chair the group.

The working group held its first meeting yesterday in Washington, D.C. We have been asked to complete a report early next year. In this relatively short time, we hope to identify the principal problems and issues with mass torts and suggest possible approaches to address them. At the end of this twelve-month period, our report will be evaluated to determine what further action is appropriate.

BACKGROUND

In the last few years, the advisory committee has devoted considerable time studying proposed amendments to Rule 23 which governs class actions. During the

course of our work, it became apparent that mass torts raised special problems in the class action context. It also became apparent that addressing the problem required separate but related inquiries into procedural rules, judicial management and legislation. It is in these areas that the mass torts working group will be focusing its attention. We hope that the inquiry conducted by the working group will prove beneficial to Congress as it considers these matters.

Let me briefly describe some of the steps the judiciary has already taken. In 1990, The Chief Justice appointed an Ad Hoc Committee on Asbestos Litigation to study ways to deal more effectively with asbestos mass torts litigation. In 1991, that committee submitted several recommendations—which were adopted by the Judicial Conference—to seek a national legislative scheme or, alternatively, legislation to expressly authorize collective trials of asbestos cases. As part of their recommendations, the ad hoc committee also suggested that the Advisory Committee on Civil Rules study Rule 23 to determine whether it could be amended to accommodate the demands of mass torts litigation.

CLASS ACTIONS

The advisory committee began its work in 1992 by reviewing a draft rule proposed in 1986 by the American Bar Association, which would have collapsed the three subdivisions of Civil Rule 23(b); created an opt-in class provision; authorized a court to permit or deny opting out of any class action; specifically governed notice

requirements for (b)(1) and (b)(2) classes; and made other changes, many of them independently significant. In 1993, the advisory committee recommended publication of a modified version of the ABA proposal, but then withdrew it for further consideration.

To understand the scope and depth of the problems, the advisory committee sponsored or participated in a series of major conferences at the law schools of the University of Pennsylvania, New York University, Southern Methodist University, and the University of Alabama. During these conferences, the advisory committee heard from experienced practitioners, judges, academics, and others. Representatives of the Litigation Section of the American Bar Association, the American College of Trial Lawyers, the American Trial Lawyers Association, and others attended and participated in this dialogue. The advisory committee also asked the Federal Judicial Center to study all class actions terminated in a two-year period in four large districts.

In the course of its six-year study, the advisory committee considered a wide array of procedural changes, including proposals to consolidate (b)(1), (b)(2), and (b)(3) class actions, to add opt-in and opt-out flexibility, to enhance notice, and to define the fiduciary responsibility of class representativeness and counsel. In the end, with the intent of moving deliberately, the advisory committee decided to recommend what it believed were five modest changes which were published for comment in August 1995.

During the six-month comment period, the advisory committee received hundreds of pages of written comments and testimony from some 90 witnesses at the public

hearings. Comments and testimony were received from the entire spectrum of experienced users of Rule 23, including plaintiffs' class action lawyers, plaintiffs' lawyers who prefer not to use the class action device, defendants' lawyers, corporate counsel, judges, academics, journalists, public interests groups, and litigants who had been class members. The advisory committee's work and the information it collected, including all the written statements and comments and transcripts of witnesses' testimony, filled a four-volume, 3,000 page compendium of the committee's working papers published in May 1997.

Although five general changes were published for comment, the Standing Committee on Rules of Practice and Procedure decided to proceed with only the proposed amendment to Rule 23(f) at this time. New subdivision (f) would authorize a permissive interlocutory appeal, in the sole discretion of the court of appeals, from an order granting or denying a class certification. The remaining proposed changes were deferred by the committee for further reflection, or set aside in anticipation of the Supreme Court's decision in *Amchem Products, Inc. v. Windsor* — a Third Circuit case holding invalid a settlement of a class action involving asbestos claimants. As you know the Supreme Court affirmed the court of appeals.

The proposed amendment on interlocutory appeal is now before the Supreme Court. It will take effect on December 1, 1998, if it is approved by the Court and Congress takes no action otherwise. The amendment should lead to the development of a

coherent body of law on the certification of class actions that will provide guidance to trial judges. It is a significant step, but its benefits will not be apparent for some time.

During its six-year study of class actions, the advisory committee reviewed the historical background of Rule 23. Judge Paul V. Niemeyer, the advisory committee's chair, recounted this review in his testimony on October 30, 1997, before the Subcommittee on Administrative Oversight and the Courts of the Senate's Committee on the Judiciary. At public hearings in 1996 and 1997, the advisory committee heard from witnesses who participated in the adoption of the class action rule in 1966, that mass torts was not on the minds of the Civil Rules Advisory Committee members. The amendments to Rule 23 were aimed at civil rights litigation and aggregation of other claims, not at mass torts.

John Frank, Esquire, who was a member of the advisory committee in 1966, related the background against which Rule 23(b)(3) was enacted. He stated:

> This is a world to which the litigation explosion had not yet come. The problems which became overwhelming in the 80's were not anticipated in the 60's. The Restatement (Second) of Torts and the development of products liability law was still in the offing. The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but, as will be shown, they were expected to be too big for the new rule.

Professor Arthur Miller, who was an adviser to the Committee at that time, recalled:

> Nothing was in the Committee's mind. . . . Nothing was going on. There were a few antitrust cases, a few securities cases. The civil rights legislation was then putative. . . . And the rule was not thought of as having the kind of implication that it now has.

About the current far-reaching application of Rule 23, Professor Miller added:

> But you can't blame the rule, because we have had the most incredible upheaval in federal substantive law in the history of the nation between 1963 and 1983, coupled with judicially-created doctrines of ancillary and pendent jurisdiction, now codified in the supplemental jurisdiction statute.
>
> It's a new world. It's a new world that imposes on this Committee problems of enormous delicacy. And you're shooting at a moving target.

At these hearings, the advisory committee heard other instructive testimony. Lawyers representing plaintiff classes and in a few instances class members themselves, testified about the value of correcting and deterring fraudulent conduct by aggregating small claims that could not be pursued individually. Citing the concept of the "private attorney general" some characterized the rule's purpose as furthering social policy by effecting disgorgement of illegally obtained gains.

From defendants, the advisory committee heard testimony of abuse and pressure exerted through the sheer mass of aggregated claims. There was testimony that the risks attending class action litigation forced settlement in nonmeritorious cases. One witness testified that the class action device is an "extraordinarily inefficient and unwise method for penalizing the defendant." Other witnesses argued the class action rule has a substantive effect independent of the underlying claims.

As Judge Niemeyer told the Senate Committee, a paradigmatic case, from the viewpoint of both plaintiffs' and defendants' lawyers, seems to have been a class action settled in Texas. The defendants there improperly rounded insurance premium charges

upward to the nearest dollar, overcharging policyholders several dollars a year. In the aggregate the charges amounted to tens of millions of dollars. Attorneys representing the plaintiffs' class settled the case, obtaining for each class member a $5.50 refund. The attorneys received in excess of $10 million in fees.

Plaintiffs' lawyers argued during hearings before the advisory committee that the Texas litigation served an important social goal in disciplining the overcharging insurance companies, in forcing disgorgement of all ill-gotten gains, and in enjoining future misconduct. The defendants' lawyers contended the case was instituted for the benefit of the attorneys, not the litigants and that the litigants were not interested in receiving $5.50 each, particularly when most had to request the refund. They argued this action should have been resolved before the Texas Insurance Commissioner who would have the power to order refunds to the insureds.

An unresolved question raised by the differing perceptions of this case and by similar testimony and commentary about other cases is whether the class action rule is intended to be solely a procedural tool to aggregate claims for judicial efficiency or whether it is also intended to serve more substantively as a social tool to enforce laws through attorneys acting de facto as private attorneys general.

MASS TORTS

Although there were earlier indications, mass torts as a litigation phenomenon did not take hold until the 1970's. Since then, mass torts filings have become a regular

feature of American jurisprudence. As modern technology intrudes into virtually all aspects of modern living, the likelihood grows that a large number of people will sustain injuries as by-products of technological advancements. The literature is full of articles documenting the steady upward trend in mass tort filings. Toxic torts, imperfect drugs, defective products, faulty medical devices, and other products of modern technology all have been held accountable for causing harm to large numbers of people. Consumer fraud, in the nature of deceptive practices, is also part of the mass torts landscape. It is apparent that the future will generate still more mass torts litigation. In most of these cases, state law, rather than federal law provides the rules of decision.

In addition to the growing influence of modern technology, changes in the legal culture have ratcheted up the use of mass torts litigation. As more lawyers have become accustomed to mass torts, more are actively participating in mass torts litigation. In certain areas, there has been a shift from individual to collective representation, which has added strains to the effective administration of justice.

Much has been learned about mass torts since the 1991 Ad Hoc Committee on Asbestos Litigation recommended that the advisory committee study changes to the class action rule. Although some solutions have been offered, none has earned a consensus. What is clear is that mass torts are complex, overlaid with many issues including some that implicate fundamental concepts of comity and fairness.

What is also apparent is that some mass torts proposals will be controversial. For many, individual disposition is a hallmark of American jurisprudence that should not be put aside for reasons of judicial efficiency. Parties control their case in individual litigation. They decide when to settle, for how much, or when to go to trial. These "rights" might be forfeited in a collective resolution, even with the right to opt out.

Yet the courts have been asked to manage a rising tide of mass torts filings. The traditional means of dispute resolution, which rely on individual litigation, have not always been successful or efficient. Mass filings, sometimes in the thousands, threaten prompt adjudication of legitimate claims. Unreasonable delay, limited funds and disparate verdicts on liability and damages raise serious questions of fairness.

CONCLUSIONS

The mass torts working group is confronting these and other issues. The working group consists of members from Judicial Conference committees with expertise in specific areas of law. We also have the benefit of a six-year study of class actions. At this early stage, however, we intend only to try to develop a general consensus on the most serious problems mass tort litigation engenders for litigants, the courts and the public, and an analysis of the most promising resolutions of those problems.

To that end, we want to continue this dialogue with you and the other members of the subcommittee on this important matter. Thank you for the opportunity to appear before you today.

Item 3B

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 14, 1998

MEMORANDUM TO THE STANDING RULES COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committees Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the office to improve its support service to the rules committees.

Personnel Changes

In January, Mark Syska joined the staff. Mark graduated from the University of Illinois College of Law. He practiced and taught law for several years after graduation before accepting a judicial fellowship in the Administrative Office. In March, Mark was detailed to another office to assist in staffing the Commission on Structural Alternatives for the Federal Courts of Appeals. The detail is scheduled to expire at the end of the year.

Update on New Initiatives

The docket sheets of all suggested amendments for Civil, Criminal, and Evidence Rules have been updated to reflect the committees' recent respective actions. Every suggested amendment along with its source and status or disposition is listed. We will update the docket sheets after each committee meeting, and they will be included in each agenda book.

The office plans to complete a draft docket sheet for Appellate Rules, based on Professor Mooney's "Table of Agenda Items." The docket sheet for Bankruptcy Rules will follow. Staffing changes prevented the draft Appellate Docket sheet from being completed prior to the Appellate Committee's spring meeting.

The office continues to research our historical records for information regarding any past relevant committee action on every new proposed amendment submitted to an advisory committee. The microfiche collection of rules-related documents was searched for prior committee action on each rule under consideration by the advisory committees at their respective fall meetings. Pertinent documents were forwarded to the appropriate reporter for consideration.

Record Keeping

Under the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* all rules-related records must "be maintained at the Administrative Office of the United States Courts for a minimum of two years and .... Thereafter the records may be transferred to a government record center. . . ."

All rules-related documents from 1935 through 1991 have been entered on microfiche and indexed. The documents for 1992 have been catalogued and shipped to a government record center. The documents for 1993 will be catalogued and boxed shortly. Congressional Information Services (CIS) — the publisher of the microfiche collection — should complete the process of placing on microfiche and indexing documents for 1992 this year. The microfiche collection continues to prove useful to us and the public in researching prior committee positions. Recently, at Professor Resnick's request staff used the collection to do extensive research on past suggestions to amend the rules governing signing of papers in bankruptcy proceedings, and the committee's action on those suggestions.

Automation Project (FRED)

Progress on our automated document management system (FRED) continues to be slow, but steady. We are beginning to recover from the delays caused by the agency's upgrade to the Windows 95 operating system and the replacement of the FRED project manager. Although the system runs with little technical oversight, the absence of a project manager during the difficult migration to Windows 95 added significant delay. We have begun to attack the large backlog of documents ready to be entered into the system. Because of these general delays, we also deferred the adoption of planned FRED enhancements. The enhancements should begin this summer. Examples of planned enhancements include: reports designed to ensure that data is entered properly and that all comments are acknowledged with appropriate follow-up responses explaining the committee's actions; document routing and workflow reports; enhanced indexing and searching capabilities; and possible remote access to the FRED database. The entire staff has been given more "robust" personal computers, which alleviated most of the "migration to Windows 95" problems. The manual system is being maintained while we complete final testing of the automated system.

The office conducted a demonstration of our automated FRED filing system for several other offices within the Administrative Office. The agency has awarded a contract to expand FRED to these other offices. This will, result in better overall technical support and some enhancements may be effected sooner than planned.

Manual Tracking

Our manual system of tracking comments continues to work well. For the current public comment period, the office to date has received, acknowledged, and forwarded approximately 42 comments and many suggestions to the appropriate committees. Each comment has been

numbered consecutively, which enabled committee members to determine instantly whether they had received all of them.

Distribution of Proposed Rule Changes

Working with the Office of Public Affairs several press releases have been released updating the media on rules-related activity. At the direction of several rules committees' chairs, our office has taken additional steps to ensure the participation of a wide cross-section of the bench and bar at every stage of the rulemaking process.

State Bar Points-of-Contact

In August 1994, Judge Stotler sent a letter to the president of each state bar association requesting that a point-of-contact be designated for the rules committee to solicit and coordinate that state bar's comments on the proposed amendments. The Standing Committee outreach to the organized bar has resulted in 43 state bars designating a point-of-contact. The names and affiliations of the points-of-contact were included in the August 1997 *Request for Comment* pamphlets.

The points-of-contact list was updated late last year. A letter will be sent to the points-of-contact requesting them to inform us if they had been replaced or would be replaced before the mailing of the next *Request for Comment* pamphlet on proposed amendments in August 1998. Because of similar efforts in the past, several state bars updated their designated point-of-contact. The process will be repeated every year to ensure that we have an accurate and up-to-date list.

Mailing List

The Administrative Office has purchased a new automated mailing list system. It recently became fully operational and should substantially reduce the time involved in maintaining and expanding the mailing list. During the transition period from the old system to the new system efforts to expand the mailing list were suspended. We had planned to add an additional 200 attorneys and 100 professors to a temporary list every six months until the list contains 2,500 names. The last mailing, however, resulted in many returned items. Therefore, we focused our efforts on updating the existing mailing list. The updating is complete, and new names are being added according to the above schedule.

Internet

The *Request for Comment* pamphlet will be available each fall on the AO's Internet Home Page (http://www.uscourts.gov). Internet access supplements, rather than replaces, our current system of targeted mailing.

The possibility of making other rules-related documents available on the Internet and electronic bulletin boards is being explored. The brochure outlining the rulemaking process has been updated and it was posted on the AO's Internet Home Page. We are working with the Circuit Executives to coordinate making local rules of court available on the Internet. Initially we planned to place local rules on a single AO website. After several internal meetings with other offices in the AO, the regional websites controlled by the Circuit Executives were determined to be a more desirable location for posting the local rules. Among other things, Circuit Executives are more likely to ensure that all revisions to local district court rules are timely posted. We have met with the Circuit Executives and advised them that we are exploring requiring posting local rules of court to the region websites. They seemed receptive to the idea. We are also exploring the possibility of placing official forms, minutes of meetings, and brief summaries of each committee meeting on the Internet.

Beginning with the *Request for Comment* to be published in August 1998 we will, as a pilot project, receive comments on the proposed rules amendments via the Internet. The AO website will need to be redesigned to accommodate the submission of comments. This system will be designed to acknowledge every comment automatically. We are working with the reporters to develop a plan to handle what might be a crush of e-mail comments. The Technology Subcommittee, along with the reporters, will examine the results of the experiment.

Besides the AO's home page on the Internet, which is available to the public, we are investigating which rules-related documents should be available on the J-Net (the courts' Intranet).

Tracking Rule Amendments

The time chart showing the status of all rules changes has been updated. It will be distributed at the meeting.

Miscellaneous

In April 1998, the Supreme Court approved and forwarded to Congress the proposed amendments to the Federal Rules of Evidence, and Appellate, Civil, and Criminal Procedure approved by the Judicial Conference at its September 1997 session. The submission had to be converted from Wordperfect to Microsoft Word to accommodate a request of the Supreme Court, which now exclusively relies on Word. The conversion required extensive proofreading. In May we advised the courts of the Supreme Court action and distributed the House Documents containing the amendments.

John K. Rabiej

Attachments

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by cmte 10/96 — Considered by cmte 10/97 — Deferred until spring '98 meeting 3/98 — Deferred until fall '98 meeting **PENDING FURTHER ACTION**
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to cmte 4/96 — Considered by cmte 10/96 — Considered by committee, assigned to subc 5/97— Considered by cmte 10/97 — Request for publication and accelerated review by ST Cmte 1/98 — Stg. Com. approves publication at regularly scheduled time **PENDING FURTHER ACTION**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Subc **PENDING FURTHER ACTION**
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/4 — Referred to reporter and chair **PENDING FURTHER ACTION**
[Non-applicable Statute]— 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[Admiralty Rule C(4) — Amend to satisfy constitutional concerns regarding default in actions *in rem*	Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition **COMPLETED**
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied **COMPLETED**
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Subc 5/97 — Discussed in reporter's memo. 3/98 — Comte approved draft **PENDING FURTHER ACTION**
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by cmte **DEFERRED INDEFINITELY**
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by cmte 4/94 — Considered by cmte 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Humphrey Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV5] — Electronic filing		10/93 — Considered by cmte 9/94 — Published for comment 10/94 — Considered 4/95 — Cmte approves amendments with revisions 6/95 — Approved by ST Cmte /95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**
[CV5] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV5(b)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV5(d)] — Whether local rules against filing of discovery documents should be abrogated or amended to conform to actual practice	Gregory B. Walters, Cir. Exec., for District Local Rules Review Cmte of Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc 3/98 — Comte. approved draft **PENDING FURTHER ACTION**
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97	10/97 — Referred to cmte 3/98 — Comte approved draft with recommendation to forward directly to the Jud Conf w/o publication **PENDING FURTHER ACTION**
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act **COMPLETED**
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by cmte 10/93 — Considered by cmte 10/94 — Considered by cmte 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Cmte for submission to Jud Conf 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court 12/97 — Effective **COMPLETED**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by committee **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G) #2830	5/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV11] — Should not be used as a discovery device or to test the legal sufficiency or efficiency of allegations in pleadings	Nicholas Kadar, M.D. 3/98 (98-CV-B)	4/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration 5/97 — Reporter recommends rejection **PENDING FURTHER ACTION**
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97 (97-CV-R)	12./97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV12(a)(3)] —Conforming amendment to Rule 4(i)		3/98 — Comte approved draft **PENDING FURTHER ACTION**
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by cmte and deferred **DEFERRED INDEFINITELY**
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by committee 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by comte deferred pending mass torts working group deliberations **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23] — Standards and guidelines for litigating and settling consumer class actions	Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves **PENDING FURTHER ACTION**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV26] — Revamp current adversarial system of federal legal practice — RAND evaluation of CJRA plans — including disclosure and discovery provisions (scope of discovery)	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College of Trial Lawyers; Allan Parmelee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by cmte 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by cmte; subc appointed 1/97 — Subc held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Subc 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte 3/98 — Comte approved draft **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by subc and left for consideration by full cmte 3/98 — Comte determined no need has been shown to amend **COMPLETED**
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Subc. 5/97 — Reporter recommends that it be considered part of discovery project **PENDING FURTHER ACTION**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair **PENDING FURTHER ACTION**
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV30(d)(2)] — presumptive one day of seven hours for deposition		3/98 — Comte approved draft **PENDING FURTHER ACTION**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study 5/97 — Reporter recommends that it be considered part of discovery project **PENDING FURTHER ACTION**
[CV34(b)] — requesting party liable for paying reasonable costs		3/98 — Comte approved draft **PENDING FURTHER ACTION**
[CV36(a)] — To not permit false denials, in view of recent Supreme Court decisions	Joanne S. Faulkner, Esq. 3/98 (98-CV-A)	4/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV37(c)(1)] — Sanctions for failure to supplement discovery		
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Cmte 1/95 — ST Cmte approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**
[CV44 — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Subc. 3/98 — Comte determined no need to amend **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox, Esq.	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Considered by advisory cmte; recommended increased attention by Fed. Jud. Center at judicial training **COMPLETED**
[CV47(b)] — Eliminate peremptory challenges	Judge Willaim Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by cmte 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — ST Cmte approves 9/96 — Jud Conf rejected 10/96 — Committee's post-mortem discussion **COMPLETED**
[CV50] — Uniform date for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Subc **PENDING FURTHER ACTION**
[CV51] — Jury instructions submitted before trial	Judge Stotler (96-CV-E)	11/8/96 — Referred to chair 5/97 — Reporter recommends consideration of comprehensive revision **PENDING FURTHER ACTION**
[CV51] — Jury instructions filed before trial	Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc 3/98 — Comte considered **PENDING FURTHER ACTION**
[CV52] — Uniform date for filing for filing post trial motion	BK Rules Cmte	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16.1 regarding "pretrial masters" 10/94 — Draft amendments considered **DEFERRED INDEFINITELY**
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Subc 5/97 — Reporter recommends rejection **PENDING FURTHER ACTION**
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion **PENDING FURTHER ACTION**
[CV59] — Uniform date for filing for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmteapproves publication 4/94 — Approved by committee 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**
[CV64] — Federal prejudgment security	ABA proposal	11/92 — Considered by cmte 5/93 — Considered by cmte 4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV65.1] — To amend to avoid conflict between 31 U.S.C. § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Subc. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring **PENDING FURTHER ACTION**
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to committee's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring **PENDING FURTHER ACTION**
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Committee should handle the issue **PENDING FURTHER ACTION**
[CV77(d)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N)	9/97 — Mailed to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV77(d)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Subc. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package **PENDING FURTHER ACTION**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package **PENDING FURTHER ACTION**
[CV83(a)(1)] — Uniform effective date for local rules		3/98 — Comte considered **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte **DEFERRED INDEFINITELY**
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I)	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Subc **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C)	5/98 —Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 12/95 — Effective **COMPLETED**
[CR 5(c)] — Misdemeanor defendant in custody is not entitled to preliminary examination. Cf CR58(b)(2)(G)	Magistrate Judge Robert B. Collings 3/94	10/94 — Deferred pending possible restylizing efforts **PENDING FURTHER ACTION**
[CR 5(c)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. 3/98 — Jud Conf instructs rules committees to propose amendment 4/98 — Approves amendment, but defers until style project completed **COMPLETED**
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Committee declined to act on the issue **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte 10/97—Adv Cmte unanimously voted to oppose any reduction in grand jury size. 1/98—ST Cmte voted to recommend that the Judicial Conference oppose the legislation. **PENDING FURTHER ACTION**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte **PENDING FURTHER ACTION**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte for public comment 10/94 — Discussed and no action taken **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Cmte decided that current practice should be reaffirmed **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**
[CR6 (f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and aprroved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte **PENDING FURTHER ACTION**
[CR8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter C. Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter and chair 10/97—Referred to subcom for study **PENDING FURTHER ACTION**
[CR 10] — Arraignment of detainees through video teleconferencing	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 10] — Defendant's presence not required		10/97 — Considered in lieu of video transmission 4/98 — Approved for publication, but deferred until completion of style project **PENDING FURTHER ACTION**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte **PENDING FURTHER ACTION**
[CR 11(d)] — Examine defendant's prior discussions with an government attorney	Judge Sidney Fitzwater 11/94	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcommittee on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation.
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcommittee appointed 4/96 — No action taken **COMPLETED**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR12.2]—authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting.	10/97—Adv Cmte voted to consider draft amendment at next meeting. 4/98 — Deferred for further study of constitutional issues **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Committee for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Deferred for further study **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte **PENDING FURTHER ACTION**
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—mental examination of defendant in capital cases	An extension of a proposed amendment to CR 12.2(DOJ) at 10/97 meeting.	10/97 Adv Cmte voted to proceed with the drafting of an amendment. **PENDING FURTHER ACTION**
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter **4/98 — Approved, but deferred until style project completed** **PENDING FURTHER ACTION**
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte **PENDING FURTHER ACTION**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **PENDING FURTHER ACTION**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules **PENDING FURTHER ACTION**
[CR 38(e)] — Conforming amendment to CR 32.2		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte **PENDING FURTHER ACTION**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**
[CR 41(c)(2)(D)] — recording of oral search warrant	J. Dowd 2/98	4/98 — Tabled until study reveals need for change **DEFERRED INDEFINITELY**
[CR 43(b)] — Arraignment of detainees by video teleconferencing; sentence absent defendant	DOJ 4/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR 43(c)(5) — Defendant to waive personal arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I)	10/97 — Referred to reporter and chair 4/98 — Approved for publication, but deferred until completion of style project **PENDING FURTHER ACTION**
[CR 43]—defendant to waive presence at arraignment	Mario Cano 97---	10/97—Adv Cmte voted to consider amendment(and related amendment to CR 10) at next meeting **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized **PENDING FURTHER ACTION**
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46 (e)] — Forfeiture of bond	H.R. 2134	4/98 — Opposed amendment **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other committees in Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair 4/98 — Referred to Technology Subcmte **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CR-J)	11/97 — Referred to reporter and chair **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte **PENDING FURTHER ACTION**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 57] — Uniform effective date for local rules	Stg Comte meeting 12/97	4/98 — Considered an deferred for further study **PENDING FURTHER ACTION**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Committee and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97—Adv Cmte appointed subcom to study issues 4/98 — Considered and further study **PENDING FURTHER ACTION**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment 4/98 — Advised that Style Subc intends to complete first draft by the end of the year **PENDING FURTHER ACTION**

AGENDA DOCKETING

ADVISORY COMMITTEE ON EVIDENCE RULES

Proposal	Source, Date, and Doc #	Status
[EV 101] — Scope		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 102 — Purpose and Construction		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 103] — Ruling on EV		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 103(a)] — When an *in limine* motion must be renewed at trial (earlier proposed amendment would have added a new Rule 103(e))		9/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Approved for publication by ST Cmte. 5/95 — Considered. Note revised. 9/95 — Published for public comment 4/96 — Considered 11/96 — Considered. Subcommittee appointed to draft alternative. 4/97 — Draft requested for publication 6/97 — ST Cmte. recommitted to advisory committee for further study 10/97 — Request to publish revised version 1/98 — Approved for publication by ST Cmte. **PENDING FURTHER ACTION**
[EV104] — Preliminary Questions		9/93 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 105] — Limited Admissibility		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Remainder of or Related Writings or Recorded Statements		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Admissibility of "hearsay" statement to correct a misimpression arising from admission of part of a record	Prof. Daniel Capra (4/97)	4/97 — Reporter to determine whether any amendment is appropriate 10/97 — No action necessary **COMPLETED**
[EV 201] — Judicial Notice of Adjudicative Facts		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to amend **COMPLETED**
[EV 201(g)] — Judicial Notice of Adjudicative Facts		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided to take no action **DEFERRED INDEFINITELY**
[EV 301] — Presumptions in General Civil Actions and Proceedings. (Applies to evidentiary presumptions but not substantive presumptions.)		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
[EV 302] — Applicability of State Law in Civil Actions and Proceedings		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 401] — Definition of "Relevant Evidence"		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 402] — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 403] — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 404] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Sen. Hatch S.3, § 503 (1/97)(dealing with 404(a)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Considered with EV 405 as alternative to EV 413-415 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Recommend publication 1/98 — Approved for publication by the ST Cmte. **PENDING FURTHER ACTION**
[EV 404(b)] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other crimes, wrongs, or acts. (Uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.)	Sen. Hatch S.3, § 713 (1/97)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Discussed 11/96 — Considered and rejected any amendment 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Proposed amendment in the Omnibus Crime Bill rejected **COMPLETED**
[EV 405] — Methods of Proving Character. (Proof in sexual misconduct cases.)		9/93 — Considered 5/94 — Considered 10/94 — Considered with EV 404 as alternative to EV 413-415 **COMPLETED**
[EV 406] — Habit; Routine Practice		10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 407] — Subsequent Remedial Measures. (Extend exclusionary principle to product liability actions, and clarify that the rule applies only to measures taken after injury or harm caused by a routine event.)	Subcmte. reviewed possibility of amending (Fall 1991)	4/92 — Considered and rejected by CR Rules Cmte. 9/93 — Considered 5/94 — Considered 10/94 — Considered 5/95 — Considered 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Approved & submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Enacted **COMPLETED**
[EV 408] — Compromise and Offers to Compromise		9/93 — Considered 5/94 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 409] — Payment of Medical and Similar Expenses		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
EV 410] — Inadmissibility of Pleas, Plea Discussions, and Related Statements		9/93 — Considered and recommended for CR Rules Cmte. **COMPLETED**
[EV 411] — Liability Insurance		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 412] — Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 10/92 — Considered by CR Rules Cmte. 10/92 — Considered by CV Rules Cmte. 12/92 — Published 5/93 — Public Hearing, Considered by EV Cmte. 7/93 — Approved by ST Cmte. 9/93 — Approved by Jud. Conf. 4/94 — Recommitted by Sup. Ct. with a change 9/94 — Sec. 40140 of the Violent Crime Control and Law Enforcement Act of 1994 (superseding Sup. Ct. action) 12/94 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 413] — Evidence of Similar Crimes in Sexual Assault Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 414] — Evidence of Similar Crimes in Child Molestation Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 415] — Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 501] — General Rule. (Guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors be adequately protected in Federal court proceedings.)	42 U.S.C., § 13942(c) (1996)	10/94 — Considered 1/95 — Considered 11/96 — Considered 1/97 — Considered by ST Cmte. 3/97 — Considered by Jud. Conf. 4/97 — Reported to Congress **COMPLETED**
[EV 501] — Privileges, including extending the same attorney client privilege to in-house counsel as to outside counsel		11/96 — Decided not to take action 10/97 — Rejected proposed amendment to extend the same privilege to in-house counsel as to outside counsel **COMPLETED**
[EV 501] Parent/Child Privilege	Proposed Legislation	4/98 — Considered; draft statement in opposition prepared
[EV 601] — General Rule of Competency		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 602] — Lack of Personal Knowledge		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 603] — Oath or Affirmation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 604] — Interpreters		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 605] — Competency of Judge as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 606] — Competency of Juror as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 607] —Who May Impeach		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608] — Evidence of Character and Conduct of Witness		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 609] — Impeachment by EV of Conviction of Crime. See 404(b)		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Declined to act **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 609(a) — Amend to include the conjunction "or" in place of "and" to avoid confusion.	Victor Mroczka 4/98 (98-EV-A)	5/98 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[EV 610] — Religious Beliefs or Opinions		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611] — Mode and Order of Interrogation and Presentation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611(b)] — Provide scope of cross-examination not be limited by subject matter of the direct		4/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to proceed **COMPLETED**
[EV 612] — Writing Used to Refresh Memory		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 613] — Prior Statements of Witnesses		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 614] — Calling and Interrogation of Witnesses by Court		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 615] — Exclusion of Witnesses. (Statute guarantees victims the right to be present at trial under certain circumstances and places some limits on rule, which requires sequestration of witnesses. Explore relationship between rule and the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997 passed in 1996.)	42 U.S.C., § 10606 (1990)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Submitted for approval without publication 6/97 — Approved by ST Cmte. 9/97 — Approved by Jud. Conf. 4/98 — Sup Ct approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 615] — Exclusion of Witnesses	Kennedy-Leahy Bill (S. 1081)	10/97 — Response to legislative proposal considered; members asked for any additional comments **PENDING FURTHER ACTION**
[EV 701] — Opinion testimony by lay witnesses		10/97 — Subcmte. formed to study need for amendment 4/98 — Recommend publication **PENDING FURTHER ACTION**
[EV 702] — Testimony by Experts	H.R. 903 and S. 79 (1997)	2/91 — Considered by CV Rules Cmte. 5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered and revised by CV and CR Rules Cmtes. 6/92 — Considered by ST Cmte. 4/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Considered (Contract with America) 4/97 — Considered. Reporter tasked with drafting proposal. 4/97 — Stotler letters to Hatch and Hyde 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication **PENDING FURTHER ACTION**
[EV 703] — Bases of Opinion Testimony by Experts. (Whether rule, which permits an expert to rely on inadmissible evidence, is being used as means of improperly evading hearsay rule.)		4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 5/94 — Considered 10/94 — Considered 11/96 — Considered 4/97 — Draft proposal considered. 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication **PENDING FURTHER ACTION**
[EV 705] — Disclosure of Facts or Data Underlying Expert Opinion		5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered by CV and CR Rules Committees 6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 706] — Court Appointed Experts. (To accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases.)	Carnegie (2/91)	2/91 — Tabled by CV Rules Cmte. 11/96 — Considered 4/97 — Considered. Deferred until CACM completes their study. **PENDING FURTHER ACTION**
[EV 801(a-c)] — Definitions: Statement; Declarant; Hearsay		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] — Definitions: Statements which are not hearsay. Prior statement by witness.		1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] Hearsay exception for prior consistent statements that would otherwise be admissible to rehabilitate a witness's credibility	Judge Bullock	4/98 — Considered; tabled **DEFERRED INDEFINITELY**
[EV 801(d)(2)] — Definitions: Statements which are not hearsay. Admission by party-opponent. (*Bourjaily*)	Drafted by Prof. David Schlueter, Reporter, 4/92	4/92 — Considered and tabled by CR Rules Committee 1/95 — Considered by ST Cmte. 5/95 — Considered draft proposed 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 802] — Hearsay Rule		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(1)-(5)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 803(6)] — Hearsay Exceptions; Authentication by Certification (See Rule 902 for parallel change)	Roger Pauley, DOJ 6/93	9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 11/96 — Considered 4/97 — Draft prepared and considered. Subcommittee appointed for further drafting. 10/97 — Draft approved for publication 1/98 — Approved for publication by the ST Cmte. **PENDING FURTHER ACTION**
[EV 803(7)-(23)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(8)] — Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports.		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered regarding trustworthiness of record 11/96 — Declined to take action regarding admission on behalf of defendant **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception	EV Rules Committee (5/95)	5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 10/97 — Effective **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception (Clarify notice requirements and determine whether it is used too broadly to admit dubious evidence)		10/96 — Considered and referred to reporter for study 10/97 — Declined to act **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 804(a)] — Hearsay Exceptions; Declarant Unavailable: Definition of unavailability	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. for publication 1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(1)-(4)] — Hearsay Exceptions		10/94 — Considered 1/95 — Considered and approved for publication by ST Cmte. 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(5)] — Hearsay Exceptions; Other exceptions		5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 10/97 — Effective **COMPLETED**
[EV 804(b)(6)] — Hearsay Exceptions; Declarant Unavailable. (To provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence.)	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. **COMPLETED**
[EV 805] — Hearsay Within Hearsay		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 806] — Attacking and Supporting Credibility of Declarant. (To eliminate a comma that mistakenly appears in the current rule. Technical amendment.)	EV Rules Committee 5/95	5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 806] — To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant		11/96 — Declined to act **COMPLETED**
[EV 807] — Other Exceptions. Residual exception. The contents of Rule 803(24) and Rule 804(b)(5) have been combined to form this new rule.	EV Rules Committee 5/95	5/95 — This new rule is a combination of Rules 803(24) and 804(b)(5). 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 10/96 — Expansion considered and rejected 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 807] — Notice of using the provisions	Judge Edward Becker	4/96 — Considered 11/96 — Reported. Declined to act. **COMPLETED**
[EV 901] — Requirement of Authentication or Identification		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902] — Self-Authentication		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902 (11) and (12)] — Self-Authentication of domestic records (See Rule 803(6) for consistent change)		10/97 — Approved for publication 1/98 — Approved for publication by the ST Cmte. **PENDING FURTHER ACTION**
[EV 903] — Subscribing Witness' Testimony Unnecessary		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 1001] — Definitions		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions (Cross references to automation changes)		10/97 — Considered **PENDING FURTHER ACTION**
[EV 1002] — Requirement of Original. Technical and conforming amendments.		9/93 — Considered 10/93 — Published for public comment 4/94 — Recommends Jud. Conf. make technical or conforming amendments 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1003] — Admissibility of Duplicates		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1004] — Admissibility of Other Evidence of Contents		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1005] — Public Records		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1006] — Summaries		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1007] — Testimony or Written Admission of Party		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1008] — Functions of Court and Jury		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 1101] — Applicability of Rules		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED** 4/98 — Considered
[EV 1102] — Amendments to permit Jud. Conf. to make technical changes	CR Rules Committee (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 9/93 — Considered 6/94 — ST Cmte. did not approve 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1103] — Title		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[Admissibility of Videotaped Expert Testimony]	EV Rules Committee (11/96)	11/96 — Denied but will continue to monitor 1/97 — Considered by ST Cmte. **PENDING FURTHER ACTION**
[Attorney-client privilege for in-house counsel]	ABA resolution (8/97)	10/97 — Referred to chair 10/97 — Denied **COMPLETED**
[Automation] — To investigate whether the EV Rules should be amended to accommodate changes in automation and technology	EV Rules Committee (11/96)	11/96 — Considered 4/97 — Considered 4/98 — Considered **PENDING FURTHER ACTION**
[Circuit Splits] — To determine whether the circuit splits warrant amending the EV Rules		11/96 — Considered 4/97 — Considered **COMPLETED**
[Obsolete or Inaccurate Rules and Notes] — To identify where the Rules and/or notes are obsolete or inaccurate.	EV Rules Committee (11/96)	5/93 — Considered 9/93 — Considered. Cmte. did not favor updating absent rule change 11/96 — Considered 1/97 — Considered by the ST Cmte. 4/97 — Considered and forwarded to ST Cmte. 10/97 — Referred to FJC 1/98 — ST Cmte. Informed of reference to FJC **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Privileges] — To codify the federal law of privileges	EV Rules Committee (11/96)	11/96 — Denied **COMPLETED**
[Statutes Bearing on Admissibility of EV] — To amend the EV Rules to incorporate by reference all of the statutes identified, outside the EV Rules, which regulate the admissibility of EV proffered in federal court		11/96 — Considered 4/97 — Considered and denied **COMPLETED**
[Sentencing Guidelines] — Applicability of EV Rules		9/93 — Considered 11/96 — Decided to take no action **COMPLETED**
[Forfeiture] — Applicability		4/96 — Considered **PENDING FURTHER ACTION**
[Foreign Business Records]		4/96 — Considered 10/97 — Considered **PENDING FURTHER ACTION**

Item 4

Agenda Item IV
Committee on Rules of Practice
and Procedure
June 1998
Information

Federal Judicial Center Report

The Federal Judicial Center welcomes the opportunity to provide the following report of education and research projects that may be of interest to the Committee on Rules of Practice and Procedure.

I. Selected Educational Programs

In calendar 1997, the Center provided 1,433 educational programs for almost 41,000 federal judge and court staff participants, released several new training publications and distributed more than 2,200 audio, video, and multimedia products from our media library. With the addition of the Federal Judicial Television Network programs in 1998, the Center will exceed the 41,000 participants reached in 1997.

1. Judicial Education Seminars. In June, the Center will hold a seminar for forty judges to provide an overview of intellectual property law and the challenges posed by new technologies. The seminar, co-sponsored with the Berkeley Center for Law and Technology, will also explore the scope of federal preemption of state protections such as contract, misappropriation, and the right of publicity. The Center will present programs on computer-generated evidence (June) and medical evidence (December) as part of the judicial education series on the Federal Judicial Television Network.

2. Training for Court Staff on the Rules of Procedure. The Center has developed two computer-based programs to assist court staff in learning and accessing the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure. The programs, to be distributed initially on a CD-ROM in June 1998, are designed to help court staff learn the rules via use of interactive scenarios.

3. Case Management for District and Magistrate Judges. The Center continues to support judges' case management efforts. This year there will again be a workshop for district and magistrate judges who have been on the bench three to six years. Civil and criminal case studies will provide the backdrop for roundtable discussions led by experienced judges. The Center has also produced two new videos for its orientation seminars for new district judges, one on civil case management and pretrial matters with Judge Rya Zobel and a second on civil trial management with Judge Ann Williams.

The following "special focus" seminars, in addition to those discussed above, are representative of the many programs offered for judges. In conducting its educational

programs, the Center draws on many sources for its faculty, including FJC and AO staff, judges and court staff, and academics.

4. Workshop on Section 1983 Litigation for District and Magistrate Judges. This workshop, scheduled for fifty district and magistrate judges in July, will allow concentrated study of Section 1983 litigation. Separate sessions will cover Supreme Court cases, Fourth Amendment claims, retaliation claims, absolute and qualified immunity, prisoner litigation, municipal and superior officer liability, and substantive due process.

5. Presentation Skills for Judges. Two programs will be offered this summer to twenty-five judges to enhance their skills in presenting information to groups in the court-room and other settings. The program includes instruction about the adult learning process and requires participants to prepare, give, and receive a critique of a brief presentation.

6. Juror Utilization. In May, seven court teams composed of one to six judges, the clerk of court, and other staff members will attend the Center's latest Juror Utilization and Management Workshop. Each team will design an action plan and will hear presentations on juror pooling, staggered trial dates, bunching, and techniques for handling notorious cases.

7. Strategic Planning. Periodically the Center conducts strategic planning workshops to help courts write a mission statement, set goals that align the court's resources with its services, and develop strategies for implementation. This summer and fall 35 bankruptcy courts and 23 district courts will attend. Follow-up programs provide support in-district.

II. Selected Research Projects

Following are examples of the more than forty active research projects that are currently under way in the Center:

1. Case Study of Procedures Used to Manage Mass Tort Class Action Settlements. Professor Jay Tidmarsh, under contract to the Center, has completed a study of procedures used in mass tort class action settlements in five recent cases. The project was designed to examine policy and case management issues related to the management of settlement class actions in mass torts. Questions asked include: How have courts perceived their role in the management of such cases? Among goals such as compensation, deterrence, fairness, and efficiency, what have courts tried to accomplish and how successful have they been? Copies of this report are being sent to the committee.

2. National Vaccine Injury Compensation Program. The Center has completed a descriptive case study of the National Vaccine Injury Compensation Program, established by Congress to compensate petitioners for injury or death arising out of the administration of governmentally mandated vaccines. Cases in the program are adjudicated by special masters appointed by the U.S. Court of Federal Claims. Because causation is a central issue in most cases, hearings frequently involve scientific expert testimony. The Center's

study examines the presentation of expert testimony and the case management procedures used in the program, with the goal of identifying procedures that might be useful in handling other kinds of mass torts. The report is being sent to all committee members.

3. ***Reference Manual on Scientific Evidence.*** A new edition of the *Reference Manual* will be published by the Center in early 1999. The manual, which is funded in part by a grant from the Carnegie Corporation of New York, presents a series of questions to help judges identify issues likely to be disputed among experts and explores the scientific support for proffered evidence. In updating the manual, the Center will also survey judges to assess current practices and problems in considering expert testimony.

4. **Evaluation of Court-Appointed Science Experts in the Breast Implant Litigation.** We have continue to monitor the progress of the expert panels created by Chief Judge Sam Pointer (AL-N) and Judge Robert Jones (OR) for breast implant cases and expect to issue the results of our evaluation when activities in these cases are completed.

5. **Judicial Conference Mass Tort Work Group.** The Center is providing research assistance as needed to the Mass Tort Work Group appointed by Chief Justice Rehnquist.

6. **Local Rules Covering Requests for Admissions.** As part of its on-going examination of the discovery rules, the Discovery Subcommittee of the Advisory Committee on Civil Rules is looking at Fed. R. Civ. P. 26(b)(2), which authorizes local rules regarding requests for admissions. The subcommittee asked the Center to identify the districts with local rules limiting the number of requests for admission and to summarize the rules.

7. **Study of Ethical Problems in Mediation in Bankruptcy Cases.** In response to recent expansion of mediation in bankruptcy courts, the Advisory Committee on Bankruptcy Rules asked the Center to conduct a nationwide survey to assess the need for national rules. The study, which was reported to the committee at its March 1998 meeting and will be published this summer, focused on ethical problems and found a very low incidence of breaches of confidentiality, mediator conflicts of interest, and ex parte contacts between mediators and judges.

8. **Waiver of Chapter 7 Filing Fee in Bankruptcy Courts.** Legislation passed late in 1993 required the implementation of a pilot program designed to evaluate the costs and benefits of waiving the filing fee for individual chapter 7 debtors who are unable to pay the fee in installments. The Bankruptcy Committee asked the Center to undertake this study; the Center's report was forwarded by the Judicial Conference to Congress in March.

9. **Discovery and Disclosure.** Results of the Center's survey of discovery and disclosure practices in district courts will be published as part of a May 1998 symposium in *The Boston College Law Review*. The Center's report on local disclosure rules has been updated as of March 1198.

Item 5

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

DATE: May 12, 1998

TO: Judge Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Will Garwood, Chair
Advisory Committee on Appellate Rules

Detailed information about the recent and future activities of the Advisory Committee on Appellate Rules can be found in the minutes of the Committee's April 1998 meeting and in the Committee's docket, both of which are attached to this report. At this time, the Committee is not seeking Standing Committee action on any proposals.

I wish to report on three matters:

1. Amendments Approved for Later Submission to the Standing Committee. As you may recall, the Advisory Committee determined at its September 1997 meeting that, barring an emergency, no amendments to FRAP will be forwarded to the Standing Committee until the bench and bar have had several months to become accustomed to the restylized rules. However, the Committee is continuing to consider and approve proposed amendments to FRAP. All amendments approved by the Committee will be held until they are presented as a group to the Standing Committee, most likely at its January 2000 meeting.

At the Advisory Committee's April meeting, the following were approved:

a. An amendment to FRAP 4(a)(1) that would provide that the time limitations of FRAP 4(a) (which apply in civil cases) and not those of FRAP 4(b) (which apply in criminal cases) would apply to appeals from orders granting or denying applications for writs of error *coram nobis*.

b. An amendment to FRAP 24(a)(2) that would eliminate a conflict between the rule and the Prison Litigation Reform Act of 1995 regarding the obligation of prisoners who are proceeding in forma pauperis to pay filing fees.

c. An amendment to FRAP 27(d)(1)(B) that would provide that, if a cover is voluntarily used on a motion, response to a motion, or reply to a response to a motion, it must be white.

d. An amendment to FRAP 28(j) that would place a 250 word limit on letters notifying the court of supplemental authorities, but remove the rule's prohibition against "argument" in those letters.

e. An amendment to FRAP 32(a)(2) that would require a tan cover to be used on supplemental briefs.

f. A Form 6, which would be added to the Appendix of Forms, and which would provide a suggested form for the certificate of compliance required by FRAP 32(a)(7)(C). (FRAP 32(a)(7)(C) requires that, when a brief exceeds a specific number of pages, the person submitting the brief must file a certificate of compliance with the type-volume limitation of FRAP 32(a)(7)(B).) In addition, the Committee approved an amendment to FRAP 32(a)(7)(C) that would provide that use of Form 6 must be regarded as sufficient to meet the requirements of FRAP 32(a)(7)(C).

g. An amendment to FRAP 32(c)(2)(A) that would provide that, if a cover is voluntarily used on a petition for rehearing or any other paper on which a cover is not required by FRAP, the cover must be white.

h. An amendment to FRAP 44 that would require parties to give written notice to clerks of challenges to the constitutionality of state statutes raised in cases in which the relevant state is not a party.

i. An amendment to FRAP 47(a)(1) that would provide (i) that a local rule may not be enforced before it is received by the Administrative Office, and (2) that all changes to local rules must take effect on December 1, except in cases of "immediate need."

The full text of these amendments, as well as the accompanying Advisory Committee Notes, can be found in the appendix to the minutes of the Committee's April meeting.

2. Removal of Proposals Regarding Unpublished Decisions from Study Agenda. The Committee removed several items from its study agenda, one of which may be of particular interest to the Standing Committee.

As you may recall, at the January 1998 meeting of the Standing Committee, I reported that the Advisory Committee had decided to consider whether FRAP should be amended to address when a judgment may be entered without opinion, when a circuit court may designate one

of its opinions as unpublished, when unpublished opinions may be electronically disseminated (*e.g.*, via Westlaw or LEXIS), when unpublished opinions may be cited, and when unpublished opinions have precedential effect.

In January, I wrote to the chief judges of all of the circuits to invite their comments and the comments of their colleagues on these issues. I received responses from almost all of the chief judges, as well as from several other circuit judges. The judges were virtually unanimous — and, on the whole, quite emphatic — that the Committee should not propose rules addressing *any* of these topics. I also appeared in person at a March meeting of the chief judges, and they again made it clear that they would oppose any rulemaking on these issues.

The members of the Committee hold various views regarding the advisability of drafting rules governing the practice of disposing of appeals without opinion or with unpublished opinions. However, all of the members recognize that, in light of the strong sentiments of the chief judges (who make up half the voting membership of the Judicial Conference), such rules have virtually no chance of becoming law in the foreseeable future. For that reason, the Committee has decided to drop this matter from its study agenda.

I should note that several members of the Committee are concerned about the refusal of the Third, Fifth, and Eleventh Circuits to provide their unpublished opinions to LEXIS and Westlaw. (All other circuits do so.) I have appointed a subcommittee, chaired by Judge Diana Gribbon Motz, to consider whether and how those circuits might be encouraged to change their practice.

3. Reports Specifically Requested By the Standing Committee. The Standing Committee has requested that the Advisory Committees report on three issues:

a. Inquiry from the Executive Committee of the Judicial Conference Regarding the Shortening of the Rules Enabling Act Process. By letter dated February 25, 1998, Judge Terrell Hodges, Chair of the Executive Committee of the Judicial Conference, asked that each of the Advisory Committees share its views regarding "whether the Rules Enabling Act time frames could be shortened without doing violence to the rulemaking process." The consensus of the Advisory Committee on Appellate Rules was that the Rules Enabling Act process is too long, and the Committee encourages the Judicial Conference to solicit and study proposals for shortening the process. However, without having any such proposals before it, the Committee finds it difficult to be more specific.

b. Recommendation of the Technology Subcommittee Regarding the Receipt of Comments on Proposed Rules Via the Internet. By letter dated March 11, 1998, Gene W. Lafitte, Chair of the Standing Committee's Subcommittee on Technology, asked that each of the Advisory Committees share its views regarding the Subcommittee's proposal that, for a trial period of two years, members of the public would be permitted to comment on proposed rules by e-mail, but the reporters would not be required to summarize those comments (although the

comments would be acknowledged by the Administrative Office). The Advisory Committee on Appellate Rules favors the proposal.

c. Request of the Standing Committee Regarding Proposed Federal Rules of Attorney Conduct. At its January 1998 meeting, the Standing Committee asked each of the Advisory Committees to share its views regarding the regulation of attorney conduct and, more specifically, regarding the "Federal Rules of Attorney Conduct" drafted by Prof. Coquillette. This request was clarified at a separate meeting between Prof. Coquillette and the Advisory Committee Reporters that took place immediately after the Standing Committee meeting, and it was clarified further by a February 11, 1998 memorandum from Prof. Coquillette to the Chairs and Reporters of the Advisory Committees. Based upon the Standing Committee meeting, the separate meeting of the Reporters, and Prof. Coquillette's memorandum, the Advisory Committee on Appellate Rules understood that it was being asked to respond to the following questions:

> **Question No. 1:** As an original matter, would this Committee seek to amend FRAP 46 even if action were not being taken to address the problem of conflicting standards of attorney conduct in the district courts?

FRAP already contains a uniform national standard governing attorney conduct; indeed, it is the only set of rules that does so. FRAP 46(b)(1)(B) provides that a member of the bar of a court of appeals may be suspended or disbarred if he or she "is guilty of conduct unbecoming a member of the court's bar." The Committee believes that FRAP 46(b)(1)(B) is working satisfactorily and does not need to be amended.

> **Question No. 2:** If the FRCP and FRCrP are amended to adopt one or more of the proposed Federal Rules of Attorney Conduct, would this Committee be willing to amend FRAP 46(b)(1)(B) to replace the "conduct unbecoming" standard with whatever approach is adopted for the district courts?

If one or more rules governing attorney conduct are adopted for the district courts, the Committee is willing to consider amending FRAP 46 to incorporate those rules, either directly or by reference. However, until the Committee knows what approach is adopted for the district courts, it cannot comment further.

> **Question No. 3:** If this Committee is inclined to amend FRAP 46(b)(1)(B) to replace the "conduct unbecoming" standard with whatever approach is adopted for the district courts, are the amendment to FRAP 46 and the Advisory Committee Note drafted by Prof. Coquillette acceptable?

Prof. Coquillette drafted an amendment to FRAP 46 and an Advisory Committee Note, and he had originally asked that his work "be reviewed for technical errors and drafting suggestions" by the Committee. However, in April, Prof. Coquillette informed Prof. Schiltz (the Committee's Reporter) that the need for this input had become less urgent in light of several

recent developments, including the continuing division over Model Rule 4.2, the sentiment of many that Standing Committee work on the attorney conduct issue needs to be coordinated with the ABA's "Ethics 2000" project, and the decision of the Advisory Committee on Bankruptcy Rules to request the Federal Judicial Center's assistance in studying attorney conduct in the bankruptcy courts. Pursuant to Prof. Coquillette's suggestion, the Committee did not discuss the amendment to FRAP 46 drafted by Prof. Coquillette.

Question No. 4: Which of the four approaches being considered by the Standing Committee should be adopted for the district courts?

Prof. Coquillette's February 11 memo refers to four approaches that the Standing Committee could take in addressing the attorney conduct problem. The Advisory Committee's preference is that, with respect to the appellate courts, the Standing Committee do nothing. The Committee takes no position on which of the four options is appropriate for the district courts; rather, it defers to the views of the Advisory Committees that draft rules governing practice in those courts.

Question No. 5: Who should have primary responsibility for drafting the Federal Rules of Attorney Conduct?

The Committee believes that, if Federal Rules of Attorney Conduct are to be drafted, they should be drafted by a separate committee composed primarily of people who are experts in legal ethics, but also of members of the Advisory Committees. The Committee does not believe that the Advisory Committees should be asked to draft such rules themselves, or that the rules should be drafted by an ad hoc committee composed *entirely* of Advisory Committee members. With rare exceptions, the members of the Advisory Committees have little or no expertise about legal ethics, and they already have a lot of work to do in the areas that *are* within their expertise.

Question No. 6: Should the Federal Rules of Attorney Conduct be promulgated as a "stand alone" set of rules or as an appendix to the FRCP and/or the FRCrP?

The Committee takes no position on this issue; rather, it defers to the views of the Advisory Committee on Civil Rules and the Advisory Committee on Criminal Rules.

Question No. 7: Does the Standing Committee have authority under the Rules Enabling Act to promulgate rules governing attorney conduct?

The Committee does not doubt that the Rules Enabling Act provides authority to regulate attorney conduct when that conduct has a discernable relationship to court proceedings. However, the Committee is concerned that the Federal Rules of Attorney Conduct drafted by Prof. Coquillette sweep far more broadly. For example, they purport to govern conflicts of interest and confidentiality of information, even when those issues arise in a context that has no

connection to federal litigation. The Committee believes that, under the Rules Enabling Act, there are significant limits on how far the Standing Committee can go in regulating attorney conduct.

Question No. 8: Does the Committee wish to suggest any revisions to the ten Federal Rules of Attorney Conduct that Prof. Coquillette has drafted?

Prof. Coquillette had originally asked the Committee to review the Federal Rules of Attorney Conduct that he had drafted and "to point out to the Standing Committee where improvements can be made." However, in his telephone conversation with Prof. Schiltz, Prof. Coquillette said that, in light of the developments discussed in connection with Question No. 3, it was not necessary that the Committee provide such input at this time. Accordingly, the Committee did not discuss this issue at its April meeting.

DRAFT

Minutes of the Spring 1998 Meeting of the
Advisory Committee on Appellate Rules
April 16, 1998
Washington, D.C.

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 16, 1998, at 8:35 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Samuel A. Alito, Jr., Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, Mr. Michael J. Meehan, and Mr. Luther T. Munford. Mr. Stephen W. Preston, Deputy Assistant Attorney General, U.S. Department of Justice, was present representing the Solicitor General. Judge Phyllis A. Kravitch was present as the liaison from the Standing Committee, and Mr. Charles R. "Fritz" Fulbruge, III, was present as the liaison from the appellate clerks. Also present were Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office and Mr. Joseph F. Spaniol, Jr., from the Standing Committee's Subcommittee on Style.

Judge Garwood announced that Judge Kravitch had replaced Judge Frank H. Easterbrook as the liaison from the Standing Committee and that Judge Alito had been appointed to fill the vacancy created by Judge Alex Kozinski's resignation, and Judge Garwood welcomed both Judge Kravitch and Judge Alito to the Committee. Judge Garwood also welcomed Judge Duval to the Committee. (Judge Duval was not able to attend the Committee's September 1997 meeting). Judge Garwood also welcomed Mr. Preston, who was substituting as the Solicitor General's representative for Mr. Douglas N. Letter.

After all those in attendance introduced themselves, Judge Garwood pointed out that Mr. Munford's term would be expiring on October 1. Judge Garwood expressed appreciation for Mr. Munford's dedicated service to the Committee and said that he hoped Mr. Munford would join the Committee at its October 1998 meeting.

II. Approval of Minutes of September 1997 Meeting

The minutes of the September 1997 meeting were approved without change.

III. Report on January 1998 Meeting of Standing Committee

Judge Garwood asked the Reporter to report on the Standing Committee's most recent meeting.

The Reporter said that Judge Garwood had informed the Standing Committee that this Advisory Committee would not be seeking authority to publish proposed changes to the Federal Rules of Appellate Procedure ("FRAP") until the bench and bar had been given a chance to become accustomed to the restylized rules. Assuming that the restylized rules take effect on December 1, 1998, the Advisory Committee will likely not send proposed amendments to the Standing Committee until late 1999 or early 2000. The Standing Committee was strongly supportive of the Advisory Committee's plan.

The Reporter also said that Judge Garwood had informed the Standing Committee that the Advisory Committee had approved a minor change to FRAP 31(b) to clarify that briefs must be served on all parties, and not just on those who are represented by counsel. Judge Garwood told the Standing Committee that, pursuant to the Advisory Committee's moratorium, the Advisory Committee was not seeking authorization to publish the amendment to FRAP 31(b) at this time.

Finally, the Reporter said that it was clear that the Standing Committee is growing increasingly frustrated with the proliferation of local rules, particularly in the district courts. The Standing Committee defeated by only one vote a motion to instruct the Advisory Committees to draft rules limiting the number of local rules that any one court could promulgate. It appears that bringing local rules under control may be a major priority of the Standing Committee over the next couple years.

Following the report on the Standing Committee meeting, Judge Garwood announced that the Supreme Court has approved the restylized rules, with only one change. As proposed by the Judicial Conference, FRAP 35(b)(1)(B) cited as an example of a "question[] of exceptional importance" meriting en banc consideration the fact that "the panel decision conflicts with the authoritative decisions of every other United States Court of Appeals that has addressed the issue." In other words, a panel decision would present an exceptionally important question only if it *created* an intercircuit split. As amended by the Supreme Court, FRAP 35(b)(1)(B) now provides as an example of a "question[] of exceptional importance" the fact that "the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." In other words, under the amendment, a panel decision on any issue on which an intercircuit conflict exists could be deemed to present a "question[] of exceptional importance," even if the panel decision did not create the conflict, and even if overturning the panel decision will not resolve the conflict.

The Committee next turned to the action items on its agenda.

IV. Action Items

A. Item No. 97-5 (FRAP 24(a)(2) — PLRA)

There is a conflict between the Prison Litigation Reform Act of 1995 ("PLRA") and FRAP 24(a)(2). FRAP 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." The PLRA appears to be to the contrary: It provides that a prisoner who brings an appeal from a civil action must "pay the full amount of a filing fee," and that a prisoner who is unable to pay the full amount of the fee at the time of filing must pay part of the fee and then pay the remainder in installments. At its September meeting, the Committee agreed that FRAP 24(a)(2) should be amended to resolve this conflict.

The Reporter introduced the following proposed amendment and Advisory Committee Note ("ACN"):

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, except as otherwise required by law. If the district court denies the motion, it must state its reasons in writing.

Advisory Committee Note

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are

unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

The Reporter said that the Subcommittee on Style had recommended that the phrase "except as otherwise required by law" be changed to "unless the law requires otherwise."

A member said that he would prefer not to make the change suggested by the Subcommittee on Style, as it implied that the appellate rules were not "law."

A member asked whether it was ever possible for a prisoner to avoid the obligation to pay a filing fee altogether. Another member responded that a prisoner could do so only if the balance in his prison trust fund account had been zero for the sixth months preceding filing, if the prisoner had made no deposits to the account prior to filing, and if the prisoner received no income while the appeal was pending.

Judge Kravitch said that she has seen a decline in meritless appeals brought by prisoners in the wake of the PLRA. Mr. Fulbruge said that the Fifth Circuit has not seen a similar decline.

A member expressed concern that, as worded, FRAP 24(a)(2) seems to imply that the presumption is that the filing fee will not be paid, whereas the presumption in the PLRA seems to be to the contrary. The member wondered whether FRAP 24(a)(2) should be reworded so that it was more consistent in tone with the PLRA. Another member disagreed, pointing out that the PLRA applies only to appeals brought by prisoners, whereas FRAP 24(a)(2) applies to all appeals brought in forma pauperis.

A member moved that the amendment and the ACN be approved, with the change recommended by the Subcommittee on Style. The motion was seconded. The motion carried (6-1).

B. Item No. 97-7 (FRAP 28(j) — permit brief explanation of supplemental authorities)

At present, FRAP 28(j) permits a party to notify the court of "pertinent and significant authorities" that come to the party's attention after the party's brief has been filed, but before decision. A party is authorized to notify the court of such authorities by letter, but parties are warned that "[t]he letter must state without argument the reasons for the supplemental citations" and that "[a]ny response . . . must be similarly limited." In fact, FRAP 28(j) is widely violated, as parties often are unable to resist the temptation to argue. A commentator has suggested amending the rule to permit brief arguments regarding supplemental authorities. At its September meeting, the Committee voted 4-3 to retain this suggestion on its study agenda.

The Reporter introduced the following proposed amendment and ACN:

Rule 28. Briefs

(j) **Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 250 words. Any response must be made promptly and must be similarly limited.

Advisory Committee Note

Subdivision (j). In the past, Rule 28(j) has required parties to describe supplemental authorities "without argument." Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing "state[ment] . . . [of] the reasons for the supplemental citations," which is required, from "argument" about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids "argument." Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a Rule 28(j) letter — that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close — cannot exceed 250 words. All words found in footnotes will count toward the 250 word limit.

The Reporter said that the Subcommittee on Style had not recommended any changes to the proposed amendment or ACN.

Judge Kravitch expressed concern over the use of the word "promptly" and wondered whether more specific direction should be provided. A member responded that "promptly" is in the current version of FRAP 28(j), and that a proposal to make FRAP 28(j) more specific had been considered and rejected at the September meeting. Another member said that he doubted that more specific direction as to timing would be workable.

A member said that, if the purpose of the amendment is to encourage argument, the amendment would be ineffective, as by the time a party describes a supplemental citation and the reasons for the supplemental citation, little of the 250 word limit will remain for argument. Several members responded that, from the Committee's perspective, the purpose of the amendment is not to encourage argument, but to make FRAP 28(j) more enforceable. It is far easier for clerks to police a rule that imposes an absolute word limit than it is for clerks to police a rule that requires them to distinguish "reasons" from "argument." The Committee is willing to tolerate some argument as the price that must be paid to get better enforcement.

A member said that, as a practitioner, he favored the amendment. Under the current version of FRAP 28(j), practitioners have to guess at what will be considered "argument" — and, if they guess wrong, their FRAP 28(j) submissions can be rejected. Under the proposed amendment, practitioners could be confident that they are complying with the rule.

Another member spoke in support of the amendment. He said that the rule would "level the playing field" between ethical and unethical attorneys; under the current rule, unethical attorneys too frequently exploit the inability or unwillingness of courts to enforce FRAP 28(j). But the member questioned whether 250 words would be sufficient, particularly in cases involving multiple supplemental authorities or supplemental authorities that were relevant to multiple issues.

A member was concerned that, as written, the ACN may encourage unduly argumentative submissions. He suggested striking the words, "But Rule 28(j) no longer forbids 'argument,'" from the draft ACN.

Mr. Fulbruge warned that, if the amendment is enacted, clerks will get motions from parties asking for permission to exceed the 250 word limit. But he agreed that, under the amendment, FRAP 28(j) would be better enforced. Clerks are not confident in their ability to distinguish statements of reasons from argument, but clerks are confident in their ability to distinguish letters that exceed 250 words from those that do not. He suspects that, if the amendment becomes law, most clerks will "eyeball" FRAP 28(j) submissions and take the time to count the words only when the submissions substantially exceed one page.

Mr. Spaniol suggested limiting FRAP 28(j) submissions to "one page." Members of the Committee objected that such a limitation would lead to manipulation of margins, spacing, font size, and the like.

A member questioned the need to amend FRAP 28(j). She acknowledged that the rule's ban on argument is widely violated, but she saw this as a minor problem. Judges who don't want to read argumentative FRAP 28(j) submissions don't have to. She found FRAP 28(j) submissions helpful, and she wanted to see them even if they exceeded 250 words. She fears that, under the amended rule, the clerks will return submissions exceeding 250 words, and judges will never learn of pertinent new authorities. She said, however, that she has sympathy for the view that the amendment would "level the playing field" between lawyers who try in good faith to comply with the rules and those who do not. Other members of the Committee agreed with this last point.

A member moved that the amendment and the ACN be approved. The motion was seconded. The motion carried (unanimously).

C. Item No. 97-9 (FRAP 32 — cover colors for rehearing petitions, etc.)

FRAP currently specifies colors for the covers of the briefs of appellants (blue), appellees (red), intervenors (green), and amici curiae (green), as well as for the covers of reply briefs (gray) and separately bound appendices (white). FRAP also provides that a cover is not required on any other paper — and it is clear, in light of FRAP 32(d), that no circuit can *require* that covers be used when FRAP has provided to the contrary.

The problem is that several circuits have promulgated local rules providing that if covers are "voluntarily" used, the covers must be particular colors. Four circuits specify cover colors for petitions for panel rehearing or rehearing en banc, three circuits specify cover colors for answers to petitions for panel rehearing or responses to petitions for rehearing en banc, two circuits specify cover colors for supplemental briefs, and one circuit specifies cover colors for motions.

These conflicting local rules create a hardship for counsel who practice in more than one circuit. A commentator has asked that FRAP be amended to specify cover colors for petitions for panel rehearing, petitions for hearing or rehearing en banc, answers to petitions for panel rehearing, responses to petitions for hearing or rehearing en banc, and supplemental briefs.

The Reporter introduced the following proposed amendments and ACNs:

Rule 27. Motions

(d) Form of Papers; Page Limits; and Number of Copies

(1) Format.

(B) A cover is not required but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

Advisory Committee Note

Subdivision (d)(1)(B). A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; ~~and~~ any reply brief, gray; and any supplemental brief, brown. The front cover of a brief must contain . . . .

Advisory Committee Note

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed — or adequately addressed — in the principal briefs. Rule 32(a)(2) has been amended to require that brown covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

Rule 32. Form of Briefs, Appendices, and Other Papers

(c) Form of Other Papers.

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) The cover of a petition for panel rehearing, a petition for hearing or rehearing en banc, an answer to a petition for panel rehearing, and a response to a petition for hearing or rehearing en banc must be yellow. A ~~a~~ cover on any other paper is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)~~;~~. If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

Advisory Committee Note

Subdivision (c)(2)(A). Rule 32(c)(2)(A) has been amended to require that yellow covers be used on petitions for panel rehearing, petitions for hearing or rehearing en banc, answers to petitions for panel rehearing (when such answers are permitted under Rule 40(a)(3)), and responses to petitions for hearing or rehearing en banc (when such responses are permitted under Rule 35(e)). The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions

for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

As Rule 32(c)(2)(A) makes clear, a cover is not required on any other paper. However, Rule 32(c)(2)(A) has been amended to provide that if a cover is nevertheless used, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

The Reporter explained that, under the draft amendments, yellow covers would be required on petitions for panel rehearing, petitions for hearing or rehearing en banc, answers to petitions for panel rehearing, and responses to petitions for hearing or rehearing en banc. Brown covers would be required on supplemental briefs. And FRAP would provide that, although covers on other papers are not necessary, if such covers are nevertheless used, the covers must be white. In this way, local rulemaking on the subject of cover colors would be completely preempted.

The Reporter said that the Subcommittee on Style had recommended the following changes in the draft amendments:

— In the *unamended* portion of FRAP 27(d)(1)(B), insert a comma after "A cover is not required" and before "but there must be."

— Begin the last sentence of the proposed FRAP 32(c)(2)(A) with "But" ("But if a cover is used . . . .") rather than with "If."

A member asked why white was chosen as the "default" cover color, given that the cover of appendices are white. He also asked why the same color — yellow — would be used on petitions for panel rehearing, petitions for hearing or rehearing en banc, answers to petitions for panel rehearing, and responses to petitions for hearing or rehearing en banc. He expressed concern that this would make it impossible for courts to distinguish among different types of papers without reading the caption carefully.

The Reporter responded that, under the current rules, all of these papers are supposed to have *no* covers, so courts are already required to read the captions to distinguish among them. As to the choice of white for the "default" color, the Reporter said that, first, the number of convenient colors is limited, and, second, that using a white cover most approximates using no cover, which is the preference of the rules.

A member asked whether "tan" would be more appropriate than "brown" as the cover color for supplemental briefs, as it suggests a lighter shade of brown — one that would permit type to be read more easily. The Reporter said that local rules refer to "brown" rather than "tan," but that he nevertheless thought the suggestion was a good one.

Mr. Preston said that the Solicitor General supports the amendment. The conflicting local rules create inconvenience for government attorneys and others with national appellate practices.

A member opposed the amendment. He said that, while he sympathizes with the desire for uniformity, he is afraid that the amendment would make life more difficult for solo practitioners and others who have limited appellate practices confined to one circuit.

A member asked whether it might be better to propose a rule that would simply prohibit circuit courts from enacting local rules on the subject of cover colors. Another member suggested proposing a rule that would say, in effect, that white covers on any other paper must be accepted. A discussion ensued about the extent to which FRAP should specify additional cover colors instead of just "preempting" local rulemaking.

The Reporter suggested the following: Amend FRAP 27(d)(1)(B) as proposed, leave FRAP 32(a)(2) unamended, and approve only the second of the two proposed amendments to FRAP 32(c)(2)(A) (that is, only the amendment that would add the sentence, "If a cover is used, it must be white.") Amending the rules in this manner would wipe out local rulemaking on the subject of cover colors by specifying, in effect, that any covers that are "voluntarily" used must be white. At the same time, it would not further complicate the rules by adding new cover colors for supplemental briefs, rehearing petitions, and so on. Several members expressed support for this approach.

A member objected. She said that she did not want the covers of supplemental briefs to be white. She would prefer that FRAP stay silent on the question of the color of the covers of supplemental briefs. The Reporter responded that this would leave conflicting local rules on that topic in place and harm the goal of uniformity.

A member asked whether FRAP 32 should be amended to specify the colors that should be used on briefs in cross-appeals. Several members responded that they did not perceive this to be a problem.

The Committee returned to the question of supplemental briefs. The Reporter suggested that, if the Committee objected to the use of white covers on supplemental briefs, FRAP 32(a)(2) should be amended as originally proposed.

A member moved the following:

1. That FRAP 27(d)(1)(B) be amended as proposed.

2. That FRAP 32(a)(2) be amended as proposed. And

3. That FRAP 32(c)(2)(A) be amended as follows:

(c) Form of Other Papers.

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A ~~a~~ cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2); If a cover is used, it must be white.

The motion was seconded. The motion carried (unanimously).

A member moved that, in the amendment to FRAP 32(a)(2) that had just been approved, the word "tan" be substituted for "brown." The motion was seconded. The motion carried (unanimously).

Judge Garwood noted that the ACN to FRAP 32(c)(2)(A) would have to be revised to reflect the changes that had been made in the proposed amendment. He asked the Reporter to attach a revised ACN as an appendix to the minutes of the meeting, and suggested that the Committee agree that the revised ACN would be treated as having been approved unless a member raised an objection to it at the October meeting. The Committee agreed to Judge Garwood's suggestion.

Reporter's Note: A revised ACN to FRAP 32(c)(2)(A) can be found in the Appendix.

D. Item No. 97-12 (FRAP 44 — notify state AG of constitutional challenges to state statutes)

FRAP 44 requires a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party to provide written notice of that challenge to the clerk. FRAP 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

Interestingly, the subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. Yet FRAP 44 does not require a party who questions the constitutionality of a state statute in a proceeding in which that state is not a party to provide written notice of that challenge to the clerk. Members of the Committee have expressed interest in remedying this omission.

The Reporter introduced the following proposed amendment and ACN:

Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

(a) **Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) **Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Advisory Committee Note

Rule 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a

constitutional challenge to any statute of that state. Curiously, though, § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

The Reporter said that the Subcommittee on Style had not recommended any changes to the proposed amendment and ACN.

A member objected to the use of the word "statute." He said that, in some states, AGs are required to defend the constitutionality of ordinances as well as statutes, and the notification obligation should extend to those enactments as well. Another member responded that § 2403(b) itself uses the word "statute" and that FRAP 44 should, as much as possible, track the language of § 2403(b).

A member asked why FRAP 44 was being split into two sections that use almost identical language. He asked whether there was a way of implementing § 2403(b) without splitting FRAP 44 into two. The Reporter responded that he did not think FRAP 44 could be drafted as the member suggested. Also, he said, splitting FRAP 44 into "section a" (addressing federal statutes) and "section b" (addressing state statutes) tracks the organization of § 2403, which is also split into "section a" (addressing federal statutes) and "section b" (addressing state statutes).

Judge Garwood reminded the Committee that this amendment grew out of a related suggestion by Judge Cornelia Kennedy to amend FRAP 44 to extend the notification requirement to constitutional challenges to federal *regulations*. He said that he agreed with the tentative decision made by the Committee at its September meeting not to pursue Judge Kennedy's suggestion, but that the matter was still open. By consensus, the Committee agreed that Judge Kennedy's suggestion should be dropped from the study agenda.

A member moved that the amendment and the ACN be approved, with one change: In the ACN, the word "But" should be substituted in place of "Curiously, though." The motion was seconded. The motion carried (unanimously).

The Committee took a 15 minute break.

E. Item No. 97-30 (FRAP 32(a)(7)(C) — certificate of compliance with type-volume limitation)

FRAP 32(a)(7) provides that a party's principal brief may not exceed 30 pages, unless it contains no more than 14,000 words or, if it uses a monospaced typeface, it contains no more than 1,300 lines of text. FRAP 32(a)(7) also provides that a party's reply brief may not exceed 15 pages, unless it contains no more than 7,000 words or, if it uses a monospaced typeface, it contains no more than 650 lines of text. If a party's principal brief does not exceed 30 pages (or

a party's reply brief does not exceed 15 pages), then the party need not certify compliance with the page limitations of FRAP 32(a)(7)(A). However, if a party's brief exceeds 30 pages (15 if the brief is a reply brief), then the party must certify that the brief complies with the word or line limitations of FRAP 32(a)(7)(B). FRAP 32(a)(7)(C) specifically states:

> (C) **Certificate of compliance.** A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:
>
> (i) the number of words in the brief; or
>
> (ii) the number of lines of monospaced type in the brief.

No example of the certificate required by FRAP 32(a)(7)(C) is provided in the Appendix of Forms to FRAP. Mr. Munford has suggested that a Form 6 be added to the Appendix to provide an illustrative form that parties could use (but would not be *required* to use) to meet their obligations under FRAP 32(a)(7)(C).

The Reporter introduced the following two alternative drafts of Form 6:

ALTERNATIVE A

Form 6. Certificate of Compliance With Rule 32(a)(7)(B)

Certificate of Compliance With Type Volume Limitations

This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

or

This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

(s)_____

Attorney for _____

Dated: _____

ALTERNATIVE B

Form 6. Certificate of Compliance With Rule 32(a)(7)(B)

Certificate of Compliance With Type Volume Limitations

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

or

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*].

or

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

The Reporter explained that "Alternative A" meets the bare bones requirements of FRAP 32(a)(7)(C): It requires the party to certify either that the brief meets the word limitation of FRAP 32(a)(7)(B) or that the brief uses a monospaced typeface and meets the line limitation of FRAP 32(a)(7)(B). In either case, the party would have to state the exact number of words or lines in the brief.

"Alternative B" contains the information found in "Alternative A," but goes on to provide information about whether the brief has been prepared in a proportionally spaced typeface or a monospaced typeface. If the former, the certificate identifies the word processing program used to produce the brief, the font size, and the type style name; if the latter, the certificate identifies the word processing program used to produce the brief, the type style name, and the number of characters per inch. This information is not required by FRAP 32(a)(7)(C), but it would assist the clerks in enforcing other provisions of FRAP 32 (particularly FRAP 32(a)(5) and (6)).

The Reporter also introduced two other alternative drafts, "Alternative C" and "Alternative D." "Alternative C" is identical to "Alternative A," except that, instead of asking a party to state the exact number of words or lines in the brief, it merely requires the party to certify that the brief does not exceed 14,000 words or 1,300 lines (7,000 words or 650 lines in the case of a reply brief). This would spare an attorney whose brief is in obvious compliance with the type volume limitations from having to re-count the words or lines of the brief if she makes last minute revisions. "Alternative D" is identical to "Alternative B," except that, like "Alternative C," it does not require a party to specify the precise number of words or lines in the brief, but only to certify that the number does not exceed 14,000 or 1,300, respectively (7,000 or 650, respectively, in the case of a reply brief).

The Reporter stated that "Alternative C" and "Alternative D" had been prepared at the suggestion of Judge Garwood, but that Judge Garwood had subsequently concluded that those two alternatives were inconsistent with the language of FRAP 32(a)(7)(C) (which requires that "[t]he certificate must *state* either: (i) the *number* of words in the brief; or (ii) the *number* of lines of monospaced type in the brief"). Judge Garwood confirmed that he had thought better of his suggestion and recommended that the Committee consider only "A" and "B."

A member said that he was disinclined to adopted "B." He said that there is no authority in FRAP 32 for requiring counsel to provide all of the information requested by "B." He recognized the use of Form 6 would not be mandatory, but he was still uncomfortable with the form requesting more than the information required by FRAP 32(a)(7)(C). Another member said that he shared the concern that "B" was not faithful to FRAP 32(a)(7)(C).

Mr. Fulbruge said that the clerks favored "B." He said that the additional information requested by "B" would be immensely helpful to clerks, particularly given the likelihood that more and more briefs will be filed on disk.

A member asked whether, if "A" were approved as an illustrative form, the circuits could adopt local rules requiring counsel to submit certificates patterned after "B" and *reject* briefs that follow "A," even though "A" appears in the appendix to FRAP. In response, another member pointed out that FRCP 84 states: "The forms contained in the Appendix of Forms are sufficient under the rules." He noted that no such statement appears in FRAP. He suggested that FRAP 32(a)(7)(C) be amended to provide that the use of Form 6 is "sufficient under the rules." After further discussion, the Committee reached a consensus that, if "A" is adopted as Form 6, FRAP 32(a)(7)(C) should expressly provide that use of "A" is sufficient.

Judge Garwood asked whether the Committee wished to go further and *require* the use of Form 6 (regardless of whether "A" or "B" were adopted). Mr. Fulbruge stated that he would require that Form 6 be used. He stressed the importance of a uniform national rule and said that the Fifth Circuit (which has adopted a local rule that closely tracks restylized FRAP 32) is already receiving a variety of certificates of compliance.

A member said that, if "A" were adopted, he might favor requiring its use. But, he said, if "B" were adopted, he would not make its use mandatory.

The Committee then discussed whether it preferred "A" or "B." Support was expressed for both versions. Those arguing in favor of "A" stressed its simplicity and ease of use. Those arguing in favor of "B" stressed how helpful it would be to clerks to have the additional information requested by "B."

One member pointed out that, if "A" were adopted, it would, as a practical matter, make it difficult for those circuits who wanted the additional information requested by "B" to get it, whereas if "B" were adopted, those circuits who did not want the additional information could ignore it or even provide in their local rules that it need not be supplied. Another member disagreed; he did not think that adopting "A" would make it difficult for courts to request the additional information described in "B."

A member asked for clarification on why the additional information requested by "B" would be useful. A member responded that the information would assist the clerks in enforcing the other requirements of FRAP 32 — such as those regarding typeface in FRAP 32(a)(5) and those regarding type styles in FRAP 32(a)(6). Mr. Fulbruge added that the assistance is much needed, and again said that the clerks would strongly prefer "B."

A member moved that the Committee approve "B" to be added as Form 6 to the Appendix of Forms. The motion was seconded.

Several members asked questions regarding the interpretation of "B." The Reporter agreed to try to reformat the form so that it was easier to understand.

A member suggested three "friendly amendments," which were accepted:

1. That the word "and" be inserted between, on the one hand, the alternative versions of paragraph (1), and, on the other hand, the alternative versions of paragraph (2).

2. That the caption be amended by striking "Rule 32(a)(7)(B)" and substituting in its place "Rule 32(a)."

3. That FRAP 32 be amended to make reference to Form 6 and to provide that it must be considered sufficient under FRAP 32(a)(7)(C).

The motion, as modified by the friendly amendments, carried (6-2).

Reporter's Note: An amendment to FRAP 32(a)(7)(C) (and accompanying ACN), as well as a reformatted version of Form 6, can be found in the Appendix.

After the motion was approved, a member asked whether Form 6 can be added to the Appendix of Forms without going through the Rules Enabling Act process, since use of the form would not be mandatory. Messrs. McCabe and Rabiej both said that it had long been the practice to use the Rules Enabling Act process for illustrative forms. Mr. Rabiej said that, while the Administrative Office ("A.O.") was looking into whether using the Rules Enabling Act process was legally required in such cases, he thought that, if FRAP 32 was going to be amended to provide that Form 6 was sufficient to meet the requirements of FRAP 32(a)(7)(C), both the amendment and the proposed form should go through the process.

F. Item Nos. 97-31 & 98-01 (FRAP 47(a) — uniform effective date for local rules and requirement of filing with A.O.)

Item Nos. 97-31 and 98-01 arise from concern over the impact of the proliferation of local rules on attorneys who practice in more than one circuit. Item No. 97-31 is a proposal made by the Local Rules Project, the American Academy of Appellate Lawyers, and the Standing Committee that a uniform effective date be established for changes to local rules. With a uniform effective date, attorneys would have to check only once each year for changes in the local rules in the circuits in which they practice. Item No. 98-01 is a proposal discussed at the Standing Committee's January meeting that no change in local rules be effective until the A.O. is notified of that change. The Standing Committee is concerned that courts have widely ignored the requirements of FRAP 47(a)(1), FRCP 83(a)(1), and FRCrP 57(c) that local rules be furnished to the A.O.

The Reporter introduced the following proposed amendment and ACN:

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) **Promulgation of Local Rules.**

(A) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(B) Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. A local rule or internal operating procedure must not be enforced before it is received by the Administrative Office of the United States Courts.

(C) An amendment to the local rules or internal operating procedures of a court of appeals must take effect on the December 1 following its adoption, unless a majority of the court's judges in regular active service determines that there is an immediate need for the amendment.

Advisory Committee Note

Subdivision (a)(1). Rule 47(a)(1) has been divided into subparts. Former Rule 47(a)(1), with the exception of the final sentence, now appears as Rule 47(a)(1)(A). The final sentence of former Rule 47(a)(1) has become the first sentence of Rule 47(a)(1)(B).

Two substantive changes have been made to Rule 47(a)(1). First, the second sentence of Rule 47(a)(1)(B) has been added to bar the enforcement of any local rule or internal operating procedure — or any change to any local rule or internal operating procedure — prior to the time that it is received by the Administrative Office of the United States Courts. Second, Rule 47(a)(1)(C) has been added to provide a uniform effective date for changes to local rules and internal operating procedures. Such changes will take effect on December 1 of each year, absent exigent circumstances.

The changes to Rule 47(a)(1) are prompted by the continuing concern of the bench and bar over the proliferation of local rules. *See* Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1 (1997). That proliferation creates a hardship for attorneys who practice in more than one court of appeals. Not only do those attorneys have to become familiar with several sets of local rules, they also must be continually on guard for changes to the local rules. In addition, although Rule 47(a)(1) requires that local rules be sent to the Administrative Office, compliance with that directive has been inconsistent. By barring enforcement of any rule that has not been received by the Administrative Office, the Committee hopes to increase compliance with Rule 47(a)(1) and to ensure that current local rules of all of the courts of appeals are available from a single source.

The Reporter said that he chose December 1 as the uniform effective date for several reasons. First, it is, of course, the effective date of changes to FRAP, as well as to other federal rules. Specifying a December 1 effective date for local rules makes it possible for attorneys to acquaint themselves with changes to local rules at the same time that they are acquainting themselves with changes to national rules. Second, a uniform effective date of December 1 means that when a change in FRAP requires (or at least inspires) a change in local rules, there

will not be a "gap" between the changes to the national rules and the conforming changes to the local rules. Finally, December 1 fits nicely with the deadlines of the two major legal publishers.

The Reporter said that, in drafting the amendment, he had difficulty deciding what must occur before a local rule can be enforced. One possibility was to bar enforcement of changes in local rules until they are *sent* to the A.O. Another possibility was to bar enforcement until the changes were *received* by the A.O. There were other possibilities as well, such as barring enforcement of changes until they are posted on the Internet by the A.O. Every option has its drawbacks.

The Reporter drafted the amendment to bar enforcement of changes in local rules until they are *received* by the A.O. mainly because it would avoid disputes. A phone call to the A.O. can instantly verify whether it has received a rule change; by contrast, unless a rule change is sent by certified mail, it can be difficult to prove exactly when it was put in the mail. Also, the Reporter considered the possibility that rule changes might get lost in transit. Each court knows when it has mailed rule changes to the A.O., and each court has a vested interest in enforcing its local rules, so it makes sense to put the burden on courts to verify that rule changes actually reach the A.O.

Mr. Rabiej said that he is concerned about making receipt by the A.O. the determinative event. He fears that his office will be inundated by telephone calls from lawyers who want to verify that no changes in local rules have been received. He would prefer that the rule instead refer to Internet posting or some similar event that can be verified without calling his office.

A member said that he objected to "received" for a different reason; he thought that it was ambiguous. He said that barring enforcement of changes in local rules until they were "on file" with the A.O. would be clearer.

A member said that, while he understood Mr. Rabiej's concern, he did not think the A.O. would receive the volume of telephone calls that Mr. Rabiej feared. In almost all cases, courts will promulgate local rule changes months before they are to take effect. Particularly with a uniform effective date, there will be little reason for attorneys to be checking with the A.O.

A member objected to the phrase "immediate need," which, he said, failed sufficiently to convey that only the most extreme circumstances would justify making a change in a local rule effective on a day other than the uniform effective date. He suggested referring instead to "exigent circumstances." Judge Garwood responded that the "immediate need" language is taken directly from 28 U.S.C. § 2071(e).

The Committee discussed whether the rule should address internal operating procedures ("IOPs") as well as local rules. One member asked what the difference was between a local rule and an IOP. Mr. Fulbruge responded that, in theory, an IOP merely describes how a court organizes itself internally — *e.g.*, how cases get placed on the argument calendar and how papers regarding rehearing petitions are circulated. Changes in IOPs are made without public notice and

comment. Local rules, by contrast, establish general rules of practice; they are enforceable against attorneys and parties. Changes in local rules are made only after public notice and comment.

A member asked why the amendment drafted by the Reporter addressed IOPs, if what Mr. Fulbruge said is true. The Reporter responded that, in many circuits, IOPs are used as local rules. It is common for circuits to include in their IOPs filing deadlines, page limitations, cover colors, and the like, and to enforce those requirements against attorneys and parties.

A member said that IOPs are not *supposed* to be used in this manner. He pointed to the following provision of FRAP 47(a)(1): "A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order." Thus, he said, he would favor limiting the amendment to just local rules.

Another member disagreed. FRAP 47(a)(1) is being ignored by some circuits, and those circuits are in fact enforcing their IOPs against attorneys and parties. That being the case, the uniform effective date should apply to IOPs, as well as to local rules.

Several other members disagreed. They said that "genuine" IOPs should not be subject to a uniform effective date and that enforcement of "genuine" IOPs should not be barred until they are received by the A.O. Courts should be able to make changes in IOPs at any time, without notice, comment, or other restriction. If a court attempts to enforce an improper IOP — that is, an IOP that is in fact operating as a local rule — attorneys and parties can rely upon FRAP 47(a)(1) for protection.

A member asked about the choice of December 1 as the uniform effective date. She wondered whether January 1 would work better. She pointed out that, although it is rare, it is possible for Congress to make changes in a proposed amendment to FRAP as late as November 30. If Congress does so, circuits will not have time before December 1 to make conforming changes in their local rules.

Another member said that he favored December 1 over January 1. Last minute changes by Congress are quite rare. Circuits can protect against such changes by making amendments to their local rules contingent upon a proposed amendment to FRAP taking effect unchanged. Also, the proposed amendment would permit circuits to change local rules instantly in cases of "immediate need." Were Congress to alter a proposed amendment to FRAP at the last minute, that alteration might very well provide "immediate need."

The member continued by pointing out that using January 1 as the uniform effective date would create another problem — a problem that was much more likely to arise. Amendments to FRAP take effect on December 1. Often, those amendments require circuits to change their local rules. If those changes had to take effect on January 1, there would be a one month gap between

the effective date of the change in FRAP and the effective date of the conforming changes in the local rules.

A member suggested that the last paragraph of the draft ACN be eliminated. He found it more "preachy" than "explanatory." Other members disagreed. Although they conceded that the last paragraph may be a bit "preachy," they thought it important that the Advisory Committee make clear its frustration with the proliferation of local rules.

A member suggested that the citation to the Sisk article be removed from the ACN. Others supported the suggestion.

A member said that, although she would vote for the amendment, she continued to be concerned about the possible burden that it would place on the A.O. She admitted that she could not immediately think of a better alternative, but she might want to discuss the matter again before the amendment is sent to the Standing Committee.

Another member said that he doubted whether the amendment would create any appreciable burden on the A.O. The vast majority of changes in local rules will take effect on December 1, and the public will receive notice of those changes long before December 1. With rare exceptions, there simply will be no need for attorneys to call the A.O.

A member moved that the amendment and ACN be approved, with two changes:

1. IOPs should be removed from the scope of the amendment, and all reference to them should be removed from the ACN. And

2. The citation to the Sisk article should be removed from the ACN.

The motion was seconded. The motion carried (unanimously).

The Reporter said that he had neglected to bring to the attention of the Committee the changes in the amendment that had been recommended by the Subcommittee on Style.

First, the Subcommittee recommended that the caption of FRAP 47(a)(1) be changed from "Promulgation of Local Rules" to "Adoption and Amendment." After a brief discussion, the Committee accepted the suggestion by consensus.

Second, the Subcommittee recommended that proposed FRAP 47(a)(1)(C) be changed so that it would be written in the singular — that is, so that it would refer to "An amendment to a local rule" instead of to "An amendment to the local rules." A member pointed out that this would change the meaning of the rule. The addition of a *new* local rule — which should take effect on the uniform effective date and should be filed with the A.O. — would always constitute "[a]n amendment to the local *rules*," but might not constitute "an amendment to a local *rule*." By consensus, the Committee rejected the suggestion of the Subcommittee.

Third, the Subcommittee recommended deleting "must take effect" and substituting in its place "becomes effective." Several members objected that the Subcommittee's recommendation would make the rule sound less prescriptive and more descriptive. A member moved that the Subcommittee's suggestion be rejected. The motion was seconded. The motion carried (unanimously).

Finally, the Subcommittee recommended deleting "determines that there is an immediate need for the amendment" and substituting in its place "orders otherwise." The Reporter pointed out that the Subcommittee's suggestion would have significant substantive consequences, by changing the rule from one that permitted deviations from the uniform effective date only when there was an "immediate need" to one that permitted deviations for any reason or no reason. Several members agreed. By consensus, the Committee rejected the Subcommittee's suggestion.

A member moved that the phrase "promulgated or amended," which appears at the end of the first sentence of proposed FRAP 47(a)(1)(B), be changed to "adopted or amended," so as to be consistent with the new caption. The motion was seconded. The motion carried (unanimously).

G. Item No. 97-41 (FRAP 4 — orders entered on motion for writ of error *coram nobis*)

Judge Garwood announced that consideration of Item No. 97-41 would be postponed until after lunch, so that Solicitor General Waxman could be present for the discussion.

V. Discussion Items

Inquiry from the Executive Committee of the Judicial Conference Regarding the Shortening of the Rules Enabling Act Process

After the agenda book was compiled, Judge Garwood received a copy of a letter written by Judge W. Terrell Hodges, Chair of the Executive Committee of the Judicial Conference, to Judge Alicemarie H. Stotler, Chair of the Standing Committee, in which Judge Hodges asked that each of the Advisory Committees share its views regarding "whether the Rules Enabling Act time frames could be shortened without doing violence to the rulemaking process." Judge Garwood opened up Judge Hodges' question for discussion.

A member expressed support for the idea. He would eliminate the need for the Standing Committee to approve rules for publication, and thus cut several months out of the process. Other members disagreed. They pointed out that the Standing Committee now often returns proposed amendments to Advisory Committees for more work before publication; if the Standing Committee could not do so until after publication, the Rules Enabling Act process might actually be lengthened, as the first round of notice-and-comment would often be for naught.

Mr. Rabiej said that another possibility that had been discussed was publishing proposed amendments twice each year. He said that, while semiannual publication would speed the process, concerns had been expressed about the burden to the bench and bar. A member said that he thought that the bench and bar would trade the minor additional inconvenience for a speedier and more responsive process.

Mr. Rabiej said that the A.O. was now attempting to determine how much time various proposals would shave from the process. He said that one of the difficulties in making reforms is working around the statutory deadlines.

Mr. McCabe said that one option that had been suggested was a special expedited schedule for rulemaking that would apply when a rule had to be proposed in response to something that Congress had done or was considering doing.

After further discussion, the Committee agreed, by consensus, that it was the sense of the Committee that the Rules Enabling Act process was too lengthy and that the Judicial Conference should solicit and study proposals for shortening the process, but that, without having any such proposals before it, the Committee could not offer more specific advice.

A. Recommendation of the Technology Subcommittee Regarding the Receipt of Comments on Proposed Rules Via the Internet

The Standing Committee's Subcommittee on Technology has proposed that, for a trial period of two years, members of the public be permitted to submit comments on proposed amendments to FRAP and the other rules via e-mail. Reporters would not be obliged to summarize comments received via e-mail, although the A.O. would briefly acknowledge each comment by return e-mail. Mr. Gene W. Lafitte, Chair of the Subcommittee on Technology, has asked the Advisory Committees for their comments on the proposal.

Mr. Rabiej described the Subcommittee's proposal, answered a couple of questions about it, and informed the Committee that the Advisory Committee on Civil Rules and Advisory Committee on Bankruptcy Rules had already approved the proposal. After a brief discussion, the Committee reached a consensus that it, too, favored the proposal.

B. Item No. 97-14 (FRAP 46(b)(1)(B) — attorney conduct)

Judge Garwood announced that consideration of Item No. 97-41 would be postponed until after lunch, so that Solicitor General Waxman could be present for the discussion.

C. Item No. 91-17 (uniform plan for publication of opinions)

Judge Garwood reported that he wrote to the chief judges of all of the circuits to seek their input regarding the Committee's consideration of rules governing unpublished opinions. Almost all of the chief judges responded — as well as several other circuit judges — and the

judges were virtually unanimous in there opposition to *any* rulemaking on the topic. In March, Judge Garwood appeared in person at a meeting of the chief judges. Again, the chief judges were almost unanimous — and, on the whole, quite emphatic — that this Committee should not propose rules governing unpublished opinions.

Judge Garwood said that the chief judges seemed to be motivated in part by a fear that the Committee would propose rules that barred judges from designating opinions as unpublished. Judge Garwood said that he tried to assure the chief judges that the Committee had no such intention, but instead was concerned about such matters as the conflicting local rules regarding the citation and precedential effect of unpublished decisions. Judge Garwood said that, notwithstanding his assurances, the chief judges remained adamant that they did not want national rulemaking on the topic of unpublished decisions.

Judge Garwood pointed out that the chief judges make up half of the voting membership of the Judicial Conference, and that the other half of the voting membership — district court judges from each circuit — was likely to defer to the chief judges on this matter. It is thus clear to Judge Garwood that rules regarding unpublished decisions have no chance of clearing the Judicial Conference in the foreseeable future. For that reason, Judge Garwood suggested that the Committee remove Item No. 91-17 from its study agenda.

A member wondered whether the Committee might propose a rule addressing only the question of whether unpublished decisions should be treated as precedential. Judge Garwood responded that he had discussed that precise topic with the chief judges, and that they were overwhelmingly opposed to national rulemaking on even that narrow issue. A member added that, in her view, Chief Judge Arnold and others make a persuasive case that the Advisory Committee does not have authority to promulgate rules regarding the precedential effect of unpublished opinions. She also said that there is no chance that judges would accept any rules that limit their ability to designate opinions as unpublished. Unpublished opinions are a way of life; in the Fourth Circuit, for example, fewer that 20% of cases result in published opinions.

Mr. Preston asked whether, notwithstanding the strong reaction of the chief judges, it might still be worthwhile to pursue rulemaking on the isolated question of the citation of unpublished opinions. He said that conflicting local practices (both written and unwritten) on the subject create a hardship for government attorneys and others who practice in more than one circuit. He said that the Solicitor General would support a rule providing that unpublished opinions may be cited; such a rule would preempt local rules to the contrary.

Judge Garwood responded that he agreed with the Solicitor General in principle and doubts both the wisdom and constitutionality of local rules that purport to bar attorneys from citing unpublished opinions. Judge Garwood pointed out that attorneys can cite a wide variety of non-precedential sources, ranging from the opinions of district courts to law review articles to treatises to Hale's *Pleas of the Crown*. All of these sources are cited only for their persuasive value. He does not understand why a court would single out one source — unpublished opinions

— and bar their citation. But Judge Garwood said that it is nevertheless clear to him that any rules on the citation of unpublished opinions have no chance of clearing the Judicial Conference.

Ms. Judith McKenna from the Federal Judicial Center (who had joined the meeting a few minutes earlier) asked whether the chief judges understood that three circuits do not make their unpublished decisions available to LEXIS or Westlaw. Judge Garwood responded that they did; at their meeting, that fact was expressly mentioned.

At this point, L. Ralph Mecham, Director of the A.O., joined the meeting, welcomed the Committee to the Judicial Conference Center, and expressed appreciation to the Committee for its contribution to the rulemaking process.

Judge Garwood noted that also pending on the Committee's agenda were Item Nos. 97-10 and 97-28, proposals to bar the circuit courts from disposing of appeals by order. Judge Garwood said that he did not survey the chief judges on these proposals, in part because he was afraid that these proposals would draw such fierce opposition that they would detract from the questions about unpublished opinions. However, Judge Garwood did mention these proposals to the chief judges at their meeting, and the reaction was exactly as expected: The chief judges were unanimously and adamantly opposed to any rule that would require an opinion in every case.

A member said that he understood the need of courts to dispose of appeals by unpublished opinions. But he remained concerned about the way in which the practice gives an advantage to the Department of Justice, large insurance companies, and others who litigate frequently in the federal courts. Those litigants can collect and organize unpublished decisions, and thus have a better sense of a court's thinking on a particular issue than their opponents. However, the member said, he recognizes the strength of the chief judges' sentiment against rulemaking. Other members expressed similar concern, but likewise acknowledged the reality of the chief judges' opposition to rulemaking on this topic.

A member said that she was most bothered by the fact that three circuits do not even make their unpublished opinions available to LEXIS and Westlaw. She said that this aggravated the disparity between "rich" and "poor" — or at least between frequent litigators and infrequent litigators. She also said that, as a matter of policy, the public should have free and convenient access to the work of the circuit courts. She wondered what was the motivation for keeping unpublished opinions from LEXIS and Westlaw.

Mr. Fulbruge explained that the Fifth Circuit was one of the three circuits that did not provide their opinions to LEXIS and Westlaw. He stressed that the opinions were not "secret"; anyone can walk into the court's library and read any unpublished decision. But, in response to questions from the Committee, Mr. Fulbruge conceded that the unpublished opinions were not on computer and not organized in any way other than chronologically. Thus, anyone who wanted to look for unpublished opinions of the Fifth Circuit on a particular issue would have no alternative but to read through thousands of opinions.

Ms. McKenna said that, in addition to the Fifth Circuit, the Third and Eleventh Circuits did not provide their unpublished opinions to LEXIS and Westlaw. She said that while, technically speaking, the unpublished opinions of these circuits were not "secret," secrecy was the practical effect of the refusal to provide the opinions to LEXIS and Westlaw. She expressed the view that this practice gives rise to the *appearance* of courts working in secrecy, which is unfortunate. She added that the Second Circuit, after being accused by a newspaper reporter of using unpublished opinions in improper ways, decided to provide its unpublished opinions to LEXIS and Westlaw — not because it agreed with the reporter, but because it concluded that whatever was gained by withholding the opinions from LEXIS and Westlaw was not worth the suspicion that was created.

A member said that, in his experience, almost all unpublished opinions would be virtually useless to litigators or the court. Another member disagreed; in her experience, while most unpublished opinions are not helpful, occasionally they can assist litigants and influence judges.

Judge Alito said that his court, the Third Circuit, did not provide its unpublished opinions to LEXIS and Westlaw, and that he supported the decision. Judge Alito said that he didn't understand the purpose of designating opinions as "unpublished" and then giving them to LEXIS and Westlaw for electronic dissemination, which, in today's world, is the equivalent of publication. In his view, it is the other circuits — the ones who designate their opinions as "unpublished" but then, as a practical matter, "publish" them electronically — who are acting inconsistently.

A member wondered whether the Committee might propose a rule that would provide that an opinion would have to be published upon the request of any member of the court. Several members responded that, as a practical matter, that is already the practice in all circuits. No court will refuse the request of one of its judges that an opinion be published.

A member said that, given the opposition of the chief judges to rulemaking regarding unpublished opinions, she was willing to drop the subject from the Committee's study agenda. However, she said that she would like the Committee to try in some way to get the Third, Fifth, and Eleventh Circuits to provide their unpublished opinions to LEXIS and Westlaw. She said that she was not necessarily talking about proposing a rule; something as simple as a letter might work. Other members agreed.

Judge Alito expressed doubt that such a letter would change the minds of his colleagues on the Third Circuit. He said that the Third Circuit was well aware that it was in the minority in not providing unpublished opinions to LEXIS and Westlaw, but that most of the judges felt strongly about it and were unlikely to change their views.

The Committee continued to discuss whether unpublished opinions are valuable, and thus whether litigators who can afford to collect those opinions or research those opinions on LEXIS and Westlaw have an advantage. Some members of the Committee asserted that unpublished

opinions have very little value and thus having access to them confers no real advantage to a litigator. Other members disagreed.

One member said that he was concerned that a vicious circle was developing: One of the reasons why there are a lot of unpublished opinions is that there are a lot of frivolous appeals, but one of the reasons why there are a lot of frivolous appeals is that there are so few published opinions describing a court's thinking on various issues.

With that, the Committee broke for lunch. Following the lunch break, Solicitor General Waxman joined the Committee, and the Committee resumed its deliberations on Item No. 91-17.

Judge Garwood said that he was prepared to entertain the following motion: Item No. 91-17 would be removed from the Committee's study agenda, without prejudice to any specific proposals regarding unpublished opinions that might be made in the future. At the same time, Judge Garwood would appoint a subcommittee to discuss whether and how the Third, Fifth, and Eleventh Circuits might be encouraged to provide their unpublished opinions to LEXIS and Westlaw. A member made the motion suggested by Judge Garwood. The motion was seconded. The motion carried (unanimously).

Judge Garwood appointed a subcommittee consisting of Judge Alito, Judge Motz, and Mr. Meehan, asked Judge Motz to chair the subcommittee, and asked Judge Kravitch if she would work with the subcommittee in her capacity as liaison from the Standing Committee.

D. Item Nos. 97-10 & 97-28 (require opinions in every case)

Item Nos. 97-10 and 97-28 (regarding proposals to bar the courts of appeals from disposing of appeals without opinion) were discussed at the same time as Item No. 91-17 (regarding proposals to regulate the use of unpublished opinions). By consensus, the Committee agreed to remove these items from its study agenda.

IV. Action Items

G. Item No. 97-41 (FRAP 4 — orders entered on motion for writ of error *coram nobis*)

The Committee returned to Agenda Item IV(G), consideration of which had been postponed until after lunch so that the Solicitor General could participate in the deliberations.

Solicitor General Waxman briefly introduced Item No. 97-41. He said that there is a "live dispute" over whether the writ of error *coram nobis* is still available in federal court. In *United States v. Morgan*, 346 U.S. 502 (1954), the Supreme Court held, 5-4, that litigants could continue to seek a writ of error *coram nobis* in federal court, at least when the applicant had been convicted of a crime, served his full sentence, and been released from custody, but was

continuing to suffer some legal disadvantage on account of the conviction. However, in *Carlisle v. United States*, 517 U.S. 416, 429 (1996), the Court said in dicta that "'it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate.'"

The Solicitor General said that the government was not asking the Committee to take a position on this issue. Rather, the concern of the government was much narrower: At present, the circuits are split on the question of whether the time to appeal an order granting or denying an application for a writ of error *coram nobis* should be as provided in FRAP 4(a) (which governs appeals in civil cases) or as provided in FRAP 4(b) (which governs appeals in criminal cases). The government seeks the Committee's help in resolving this split. The government prefers that the time limitations of FRAP 4(a) apply, but the government can accept the time limitations of FRAP 4(b). From the government's perspective, the important thing is to get a uniform national rule; the government is less concerned about which rule is adopted.

The Committee considered the following proposed amendment and ACN:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

Advisory Committee Note

Subdivision 4(a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations in Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v.*

Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals in those cases in which federal courts determine that they have authority to issue the writ.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

A member noted that the draft amendment provided that an appeal from an order disposing of an application for a writ of error *coram nobis* "is an appeal in a civil case for purposes of Rule 4(a)." He wondered whether there were any other rules in FRAP — other than FRAP 4 — that treated civil and criminal cases differently. If so, he said, the amendment might have to be expanded to provide that *coram nobis* appeals should also be treated as civil cases for the purposes of those other rules. Neither the Solicitor General nor any other member of the Committee could think of any such rules.

A member was concerned about the ACN stating that the amendment "is merely meant to specify time limitations for appeals in those cases in which federal courts determine that they have authority to issue the writ." That phrase is misleading. The time limitations of FRAP 4(a) should apply even if the reason why the district court declines to issue the writ of error *coram nobis* is that it concludes that it does *not* "have authority to issue the writ." As written, though, the ACN suggests that only if the district court first concludes that it has authority to issue the writ would the time limitations of FRAP 4(a) apply.

A member said that the ambiguity could be eliminated if a period were inserted after the word "appeals" and the remainder of the sentence deleted. Another member agreed, and moved that the amendment and ACN be approved, with the change to the ACN that had been suggested. The motion was seconded.

A member asked how often appeals from grants or denials of applications for the writ of error *coram nobis* are heard. Another member said that, on his court, there were, on average, probably two or three such appeals heard each year. The Reporter said that he had briefly researched this question and found that such appeals were quite infrequent. The Solicitor General agreed, but said that he thought that amending FRAP 4 was still worthwhile. It is likely to be several years before the Supreme Court decides whether the writ still exists; in the meantime, there is a purely procedural conflict that can easily be resolved by amending FRAP.

A member asked whether the district courts treated applications for the writ as civil cases or as criminal cases. The practice of the district courts is relevant to whether the time limitations of FRAP 4(a) or FRAP 4(b) should apply, as the practice of the district courts creates expectations about the practice of the appellate courts.

The Solicitor General responded that an application for a writ of error *coram nobis* is similar to a motion under 28 U.S.C. § 2255. Section 2255 motions are treated as civil matters, and thus attorneys are likely to expect that applications for writs of error *coram nobis* will be treated similarly. If the shorter deadlines of FRAP 4(b) are applied to *coram nobis* appeals, attorneys will get "trapped" and bring challenges to the validity of the rule. But if the longer deadlines of FRAP 4(a) are applied, the only surprise awaiting attorneys will be that they have more time to file their appeals than they thought.

Mr. Spaniol asked whether adopting the amendment might make it more likely that the Supreme Court will continue to recognize the validity of the writ. A couple members responded that they thought not, given that the ACN clearly states that the Committee takes no position on that question.

The motion carried (unanimously).

V. Discussion Items

B. Item No. 97-14 (FRAP 46(b)(1)(B) — attorney conduct)

The Committee turned to Agenda Item V(B), consideration of which had been postponed until after lunch so that Solicitor General Waxman could participate in the deliberations. Judge Garwood asked the Reporter to introduce Item No. 97-14.

The Reporter said that the Standing Committee is determined to do something about the wide variety of local rules governing attorney conduct. At its last meeting, the Standing Committee indicated that it wanted the Advisory Committees to provide their views on several issues. The Reporter said that, as he understands it, the Standing Committee is looking for input on eight questions. Those questions are described in a memo that the Reporter distributed to the Advisory Committee.

The Reporter mentioned that, earlier this week, he received a call from Prof. Daniel Coquillette, the Reporter to the Standing Committee. Prof. Coquillette said that he would be unable to attend the Advisory Committee's meeting and participate in its deliberations on the eight questions. He asked, though, that the Reporter describe for the Committee some recent developments, as well as some of Prof. Coquillette's thoughts about the eight questions.

> **Question No. 1:** As an original matter, would this Committee seek to amend Rule 46 even if action were not being taken to address the problem of conflicting standards of attorney conduct in the trial courts?

The Reporter explained that what seems to be driving Standing Committee action on attorney conduct is the lack of uniform national standards. However, FRAP is the one set of rules that *contains* a uniform national standard governing attorney conduct — the "conduct unbecoming" standard of FRAP 46(b)(1)(B). Prof. Coquillette concedes that a uniform national standard applies in the appellate courts and that the appellate courts have had few problems with it. He nevertheless believes that FRAP 46 should be amended because "conduct unbecoming" is extremely vague.

> **Question No. 2:** If the FRCP and FRCrP are amended to adopt one or more of the proposed Federal Rules of Attorney Conduct, would this Committee be willing to amend Rule 46(b)(1)(B) to replace the "conduct unbecoming" standard with whatever approach is adopted for the district courts?

Prof. Coquillette said that he understands the desire of this Committee to take a backseat role in the deliberations over attorney conduct standards. However, he very much hopes that if uniform rules are adopted for the district courts, FRAP 46 will be amended to incorporate those standards.

Question No. 3: If this Committee is inclined to amend Rule 46(b)(1)(B) to replace the "conduct unbecoming" standard with whatever approach is adopted for the district courts, are the amendment to Rule 46 and the Advisory Committee Note drafted by Prof. Coquillette acceptable?

Prof. Coquillette had originally asked for comments on an amendment to FRAP 46 and ACN that he had drafted. However, Prof. Coquillette told the Reporter that, for several reasons, such input had become less urgent. First, at the Advisory Committee meetings that Prof. Coquillette has attended so far this spring, it was clear that there are deep divisions over the proper approach to regulating attorney conduct, and it will take some time to resolve those disputes. Second, it has also become clear that there is a lot of sentiment for coordinating the Standing Committee's work on attorney conduct issues with the work of the ABA's "Ethics 2000" project. And third, the Advisory Committee on Bankruptcy Rules has asked the Federal Judicial Center to conduct a study to assist the Committee in deciding what approach it should take. That study will take at least a year.

Question No. 4: Which of the four approaches being considered by the Standing Committee should be adopted for the district courts?

As noted, the Standing Committee's activities on the attorney conduct issue arise from the Committee's concern about the variety of conflicting standards in the district courts. For that problem to be solved, one of two approaches must be adopted. First, the Standing Committee could recommend a single rule that would provide that state standards will govern attorney conduct in federal court. This approach — the "dynamic conformity" approach — would essentially put the Rules Committees — and the federal courts — out of the business of drafting attorney conduct standards. Second, the Standing Committee could recommend a comprehensive set of Federal Rules of Attorney Conduct ("FRAC"). This would put the Rules Committees — and the federal courts — deeply *in* the business of drafting attorney conduct standards. The disagreements over how attorney conduct in federal courts should be regulated essentially relate to where on the continuum between, on the one hand, total deference to state standards, and, on the other hand, comprehensive federal regulation the Standing Committee should come to rest.

The Reporter said that it is his impression that this general debate has been "hijacked" by the fight over the enforcement of Model Rule 4.2 against federal prosecutors. On one side of this debate are the state judges, who favor the dynamic conformity approach, and thus the application of Rule 4.2 against federal prosecutors. On the other side of this debate is the Justice Department, which opposes the dynamic conformity approach as being insufficiently protective of important federal interests, including the federal interest in not having Rule 4.2 enforced against federal prosecutors. The Reporter said that Prof. Coquillette and others seem to be trying to find a compromise position — for example, a very limited set of federal rules, with most attorney conduct issues being left to state regulation — but they will have trouble succeeding until the dispute over Rule 4.2 is resolved.

Prof. Coquillette informed the Reporter that the Advisory Committees that have already met this spring were deeply divided over this issue, with many members sympathizing with the position of the state judges, and many other members sympathizing with the position of the Justice Department.

Question No. 5: Who should have primary responsibility for drafting the Federal Rules of Attorney Conduct?

The Reporter said that, at the January meeting of the Standing Committee, Prof. Coquillette advocated that work on drafting the FRAC be done by the Advisory Committees or by an ad hoc committee comprised of members of each of the Advisory Committees. The Reporters to the Advisory Committees disagreed, arguing that the members of the Advisory Committees were not selected for their expertise on legal ethics and already have plenty of work to do.

In his telephone conversation with the Reporter, Prof. Coquillette said that it has "already been decided" that an ad hoc committee comprised of two members of each Advisory Committee and a representative of the Department of Justice will work on drafting the FRAC. As to the concerns about the lack of expertise of Advisory Committee members, Prof. Coquillette said that such expertise exists on the Standing Committee.

Question No. 6: Should the Federal Rules of Attorney Conduct be promulgated as a "stand alone" set of rules or as an appendix to the FRCP and/or the FRCrP?

Prof. Coquillette said that the Advisory Committees that have already discussed this question were of the view that its answer depends upon what approach is adopted. If the Standing Committee decides to adopt a single dynamic conformity rule, that rule should probably be part of the rules of appellate, civil, and criminal procedure. If the Standing Committee decides to adopt a comprehensive set of FRAC, those rules should probably be promulgated as a stand alone set of rules.

Question No. 7: Does the Standing Committee have authority under the Rules Enabling Act to promulgate rules governing attorney conduct?

Prof. Coquillette said that this issue, which had been pressed by the Reporters at the Standing Committee meeting, was "not a concern," as federal courts are already deeply involved in enacting local rules governing attorney conduct. The question for the Standing Committee is merely whether to replace the rules that already exist with national rules.

The Reporter said that he was not as confident as Prof. Coquillette about whether the Rules Enabling Act provides authority to promulgate rules governing attorney conduct. The Reporter said that he had no doubt that the Rules Enabling Act provided authority to regulate attorney conduct that was closely related to court proceedings — such as conduct that occurs in court or that impacts upon court proceedings. However, the rules drafted by Prof. Coquillette would sweep far more broadly and purport to govern such issues as conflicts of interests and the

confidentiality of information, even when those issues arise in a context that is far removed from federal litigation.

Question No. 8: Does the Committee wish to suggest any revisions to the ten Federal Rules of Attorney Conduct that Prof. Coquillette has drafted?

Prof. Coquillette said that the Committee need not worry about this question at this time, because, in light of the developments discussed in connection with Question No. 3, the need for this input has become less urgent.

Following the report of the Reporter, Judge Garwood opened the floor for comments.

A member said that he was unclear about the scope of the rules that the Standing Committee was contemplating. Would they address only the suspension, disbarment, or other discipline of attorneys? Would they affect the right of district courts to sanction conduct under FRCP 11 or their inherent authority? The Reporter responded that, as he understood the various proposals, none would affect the authority of district courts under FRCP 11; rather, the rules were addressed to when attorneys can be formally disciplined — such as by suspension — for unethical conduct.

The Solicitor General said that he shared the view of Prof. Coquillette that something had to be done about the enormous variety of conflicting local rules. He said that the situation is a mess, and that it has a negative impact on the Department of Justice. For example, when the Department is conducting a criminal investigation of conduct occurring in 17 states, there may be two dozen or more sets of rules — many of which conflict — governing the conduct of the attorneys involved in that investigation. The present situation is intolerable.

At the same time, the Solicitor General acknowledged that solving the problem will be difficult. The dynamic conformity approach would bring about vertical unity — that is, it would ensure that the standards that governed attorney conduct in a federal court in Illinois would be identical to those that governed attorney conduct in a state court in Illinois — but it would create horizontal disunity — that is, it would result in one set of standards governing attorney conduct in federal court in Illinois, and another set of standards governing attorney conduct in federal court in New York. The FRAC approach would create horizontal unity — the same standards would apply in all federal courts — but vertical disunity — different standards would apply within the same state, depending upon whether the attorney was in federal or state court.

The Solicitor General said that the Justice Department would prefer a comprehensive set of federal rules that would produce horizontal unity. Failing that, the Justice Department could accept a limited number of federal rules that addressed "important" or "core" matters of federal concern, and that left the regulation of remaining matters to the discretion of district courts. The one thing that was unacceptable to the Justice Department was any kind of "dynamic conformity" approach — that is, any kind of rule that directly or by implication incorporated state standards into federal rules. In the Department's view, such an approach would put federal interests at undue risk. If a state was to change one of its rules in a way that threatened federal interests, the

only alternatives for the Department would be Congressional action or the lengthy Rules Enabling Act process.

As to who should draft the federal rules preferred by the Department, the Solicitor General said that the Department had recommended the appointment of a separate committee comprised of experts in legal ethics. The Department agrees that this responsibility should not be assigned to the Advisory Committees. However, the Solicitor General said, if an ad hoc committee comprised of members of the Advisory Committees is appointed, the Department will certainly work with it.

A member asked about the status of the negotiations between the Department and the Conference of Chief Justices regarding Rule 4.2. The Solicitor General said that a working group appointed by the Department and the Conference had, after about a year of deliberations, come up with a compromise proposal. That proposal has been distributed among the chief justices for comment. If the chief justices support it, the Department will almost surely support it as well. The Solicitor General noted that the criminal defense bar opposes the compromise proposal.

A member asked the Solicitor General whether the Department had any problem with FRAP 46. The Solicitor General said that it did not.

Judge Garwood said that he, too, was satisfied with FRAP 46, and felt no particular need to change it. Several members agreed. One member pointed out that, a couple years ago, the Committee considered a proposal to amend FRAP 46, and the Committee decided not to pursue it. The Committee's view at that time was "if it ain't broke, don't fix it."

The Solicitor General agreed that the attorney conduct problem concerns the district courts, not the courts of appeals. The Solicitor General also said that the fight over Rule 4.2 was influencing the deliberations over this more general question. He said that the Rule 4.2 issue rarely arises in a way that is directly connected to litigation, but rather arises outside of court when, for example, a U.S. Attorney instructs an FBI agent to make contact with an undercover source.

The Reporter asked the Solicitor General whether, in light of that fact, the Rules Enabling Act provided authority for regulating out-of-court criminal investigations. The Solicitor General responded that the Act provided the necessarily authority, as almost always there is at least *some* connection between a federal criminal investigation and a court proceeding. A member pointed out, though, that some of the ten FRAC drafted by Prof. Coquillette purport to govern conduct that is not even remotely related to court proceedings.

After further discussion, the Committee reached a consensus on this much: FRAP 46 is working satisfactorily and does not need to be amended. If one or more rules governing attorney conduct are adopted for the district courts, this Committee is willing to consider amending FRAP 46 to incorporate those rules. However, until it knows what approach is in fact adopted for the district courts, this Committee cannot comment further. The Committee has no position on what

approach should be adopted for the district courts; it defers to the views of the Advisory Committees that draft rules governing practice in those courts.

The Committee then deliberated the question of who should have primary responsibility for drafting the FRAC. Several members expressed the view that members of the Advisory Committees should not have primary responsibility for this task, given their lack of expertise, and given the fact that they already have a lot to do. One member said that, in his opinion, if there are to be rules governing attorney conduct, they should be enacted by Congress.

A member said that if the Rules Enabling Act process is used to draft rules governing attorney conduct, a separate committee should be appointed. The Advisory Committees should not be asked to do this work. However, she thought that the Advisory Committees should be willing to contribute members to this separate committee.

Another member agreed. He said that if the committee appointed to write the rules is comprised solely of experts on legal ethics, those experts would have a vested interest in writing as many rules as possible. If the committee includes non-experts from the Advisory Committees, they can act as a "check" on the experts.

A member said that, regardless of how the committee is composed, it should work closely with the ABA's "Ethics 2000" project. The Solicitor General disagreed. He said that the work of the "Ethics 2000" project would not be done in 2000, and perhaps not even near 2000. Tying the drafting of the FRAC too closely to the work of the ABA could delay the federal rules for several years. In addition, there is no reason to believe that the "Ethics 2000" project will be any more sensitive to federal interests than the Conference of Chief Justices.

A member asked the Solicitor General whether the Justice Department was experiencing problems with the application of any Model Rule other than Rule 4.2. The Solicitor General said that there had been a problem with Rule 3.3 and Rule 3.8, as interpreted by one or two state courts, but, except for very occasional and very discrete issues, most of the problems experienced by the Justice Department related to Rule 4.2.

A member said that he agreed with a comment that had been made earlier: Including members of Advisory Committees on the committee that will draft the FRAC could act as an important "check." For example, the member said, someone on the committee should be willing to argue *against* making changes to FRAP 46.

Another member agreed. He expressed concern about the manner in which ethical rules were being transformed into liability rules. He said that he would oppose any comprehensive set of federal rules governing attorney conduct. In his view, if there are problems — such as the problems arising out of the application of Rule 4.2 — those problems should be addressed through precise, narrowly focused rules.

A member said that she expected that district courts may have a different take on this issue than appellate courts. Another member agreed. He can understand why district courts

would be jealous about guarding their ability to address conduct that occurs in court and reluctant to turn over the regulation of that conduct to the states. At the same time, he thought that the Standing Committee has no business making rules that would regulate what a lawyer does in his office, if his conduct has no connection to court proceedings.

After further discussion, the Committee reached a consensus that the Advisory Committees should have input into the drafting of the FRAC, primarily to act as a "check" on the process, but that the main responsibility for drafting those rules should reside with others — people who have expertise in legal ethics. The Committee also views the concern about the drafters not exceeding their authority under the Rules Enabling Act as serious; the rules should address only attorney conduct that has a discernable impact on court proceedings. As to whether the FRAC should be promulgated as a "stand alone" set of rules or as part of the FRCP or FRCrP, the Committee takes no view. Again, it is willing to defer to the sentiments of the Advisory Committee on Civil Rules and the Advisory Committee on Criminal Rules.

E. Item Nos. 95-4 & 97-1 (FRAP 26(a) — making time computation under FRAP consistent with time computation under FRCP and FRCrP)

The FRCP and FRCrP compute time differently than FRAP. FRCP 6(a) and FRCrP 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, FRAP 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the FRCP and FRCrP than they are under FRAP. Two commentators have asked that FRAP 26(a)(2) be amended to conform to FRCP 6(a) and FRCrP 45(a). They argue that the present difference serves no substantive purpose and creates a trap for unwary litigants.

To inform the discussion of these proposals, the Reporter prepared a draft amendment and ACN, as well as a list of all of the 7 and 10 day deadlines in FRAP that would, as a *practical* matter, be extended by at least two days if FRAP 26(a)(2) was amended as proposed. (There are no 8 or 9 day deadlines in FRAP.)

Judge Garwood introduced this agenda item and mentioned that Judge Richard Posner had recently written an opinion calling for FRAP 26(a)(2) to be amended as proposed. Judge Garwood pointed to another "trap" relating to time computation: According to FRAP 26(a)(2), when a deadline is stated in "calendar days" instead of in "days,"intermediate Saturdays, Sundays, and legal holidays are *not* excluded, even if the deadline is less than 7 days.

Judge Garwood said that, before the Committee makes a final decision on this proposal, it needs to look carefully at the 7 and 10 day deadlines in FRAP. Those deadlines — especially the 7 day deadlines — are grounded upon the assumption that intermediate Saturdays, Sundays, and legal holidays will be counted. If that will no longer be true, the Committee may want to shorten some of the 7 day deadlines to 5 days, or some of the 10 day deadlines to 7 or 8 days.

A member said that he did not favor the proposal. Changing the method of calculation would affect too many rules. There is nothing ambiguous about the rule; the only lawyers who fall into the "trap" are those who do not read the rule carefully, and he does not have much sympathy for them.

Several other members disagreed and expressed strong support for the proposal. In their view, there is no reason why time should be calculated differently under FRAP than it is under the FRCP or FRCrP. It creates a trap for unwary litigators, which is bad enough, but it is a trap that serves no substantive purpose whatsoever.

A member said that his court regularly has to deal with criminal cases in which parties have filed notices of appeal too late, upon the assumption that the 10 day deadline in FRAP 4(b) is calculated as it is under the FRCrP. The result is many needless dismissals, motions to extend, ineffective assistance of counsel claims, and the like.

A member asked that, prior to the next Advisory Committee meeting, the Reporter identify all instances in which FRAP deadlines are stated in *calendar* days. If there are few such instances, the Committee may want to eliminate the disparity between "days" and "calendar days," state all deadlines in "days," and count all days in the same manner — the FRCP/FRCrP manner. This might require adjusting some deadlines, though.

A member moved that the Committee approve in principle the suggestion that FRAP 26(a)(2) be amended so that, in computing any period of time, intermediate Saturdays, Sundays, and legal holidays will be excluded when the period is less than 11 days, rather than less than 7 days. However, the Committee will defer any definitive action on the proposal until its October meeting, so that members can examine the list of 7 and 10 day deadlines that will be affected and consider whether any of those deadlines should be shortened.

The motion was seconded. The motion carried (unanimously).

F. Item No. 95-5 (FRAP 32 — require digitally readable copy of brief, when available)

The Reporter said that this agenda item arose out of a suggestion by Judge Frank Easterbrook that FRAP 32 be amended to require that briefs be filed and served on computer disk. In January, Judge Garwood wrote to the appellate clerks and asked for their comments on this suggestion. All of the clerks, save those of the Third and Ninth Circuits, responded. The responses from the clerks varied substantially. Some clerks strongly opposed any national rulemaking on this topic, while others strongly supported it. On balance, the clerks were about evenly divided.

The Reporter said that implementing Judge Easterbrook's suggestion was far more complicated than may have first appeared. Before drafting could even begin on an amendment, a number of questions would have to be resolved. The Reporter provided a memo to the Committee in which many of those questions were described. The Reporter said that, in light of

the complexity of the task, the sharp disagreement among the clerks, the relative lack of experience that the clerks have in dealing with filings on computer disk, the work being done by the Subcommittee on Technology, the experiments with electronic filing that are ongoing, and the lingering concerns over computer viruses, he recommends that the Committee remove this item from its study agenda.

Several members agreed with the recommendation, for the reasons stated by the Reporter. Particular concern was expressed about the problem with viruses and about the need for more experimentation before national rules are adopted.

Mr. McCabe described some of the experiments with electronic filing technology that are now being conducted. He said that, as written, FRAP permits courts to experiment with technology. He would not mandate that courts accept briefs on disk or over the Internet until further experimentation can take place.

Mr. Fulbruge agreed. He added that many judges, law clerks, and others are unwilling to work with briefs or other materials that are available *only* electronically. Thus, if filing briefs on disk were required, someone — either the judge, or the clerk's office, or the attorneys — would still have to print out hard copies. Mr. Fulbruge thinks that a "paperless" appellate system is still many years away.

One member said that she sympathized with those judges who have poor vision and want briefs on disk so that the type can be enlarged, but nothing prevents those judges from requesting the parties to submit a digital copy of their briefs, and she suspects that few parties would refuse such a request. Another member pointed out that any court can now amend its local rules to request parties to submit briefs on disk, as several have done.

A member moved that Item No. 95-5 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

G. Item No. 95-8 (FRAP 4(a)(7) — repeal collateral order doctrine?)

Item No. 95-08 was placed on the Committee's study agenda by Mr. Munford, who was concerned that, read literally, FRAP 4(a)(7) might repeal the collateral order doctrine. FRAP 4(a)(1)(A) permits an appeal in a civil case to be filed "within 30 days after the judgment or order appealed from is entered." FRAP 4(a)(7), in turn, provides that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Under the terms of FRCP 58, a judgment is required to "be set forth on a separate document" — that is, on a document separate from any memorandum, opinion, or other document that describes the reasons for the entry of the judgment. Mr. Munford's concern was that, because collateral orders are generally not "set forth on a separate document" (but rather set forth on a document that describes the reasons for their issuance), they are not "entered in compliance with Rule[] 58" — and, because they are not "entered in compliance with Rule[] 58," they cannot be appealed under FRAP 4(a)(1)(A).

At the Committee's September meeting, Mr. Munford agreed to look into the matter further and, if he deemed it appropriate, to draft an amendment to FRAP 4 for the Committee to consider. Subsequent to the September meeting, Judge Garwood asked Mr. Munford to examine a closely related question involving the application of FRAP 4(a)(7) to orders that grant or deny the post-trial motions listed in FRAP 4(a)(4)(A).

Mr. Munford told the Committee that he had concluded that his original concern — the impact of FRAP 4(a)(7) on collateral orders — was not worth pursuing, and should be removed from the Committee's study agenda. He said that courts have consistently held that FRCP 58 does indeed apply to collateral orders. Mr. Munford said that, in light of that fact, it might be wise for the Advisory Committee on Civil Rules to redraft FRCP 58, which buries the separate document requirement in text that, on first glance, appears to apply only to judgments entered at the conclusion of a case. But he did not think that this Committee needed to devote any further attention to the matter, except insofar as collateral orders are affected by the "prematurity question" (see below).

Mr. Munford said that, by contrast, the question that Judge Garwood asked him to research — the application of FRAP 4(a)(7) to orders that grant or deny those post-judgment motions listed in FRAP 4(a)(4)(A) — was well worth the Committee's attention. The circuits are badly split on the subject, and one circuit has specifically asked this Committee for guidance.

The problem is this: Under FRAP 4(a)(4)(A), the time to file an appeal is tolled upon the filing of any of several post-trial motions — including a motion for judgment under FRCP 50(b), a motion to amend or make additional factual findings under FRCP 52(b), a motion for attorney's fees under FRCP 54 (if the district court extends the time to appeal under FRCP 58), a motion to alter or amend the judgment under FRCP 59, a motion for a new trial under FRCP 59, and a motion for relief from the judgment under FRCP 60 (if the motion is filed within 10 days after entry of judgment). According to FRAP 4(a)(4)A), when one of these motions is filed with the district court at the conclusion of a civil case, the time to file a notice of appeal in that case does not begin to run until "the entry of the order disposing of the last such remaining motion." That gives rise to at least three questions:

1. The "Applicability" Question: Does FRCP 58 apply to the "order" referred to in FRAP 4(a)(4)(A) — that is, to "the order disposing of the last such remaining motion"?

Suppose that, in a diversity case arising out of an automobile accident, the jury returns a verdict for the plaintiff, and the district court enters judgment accordingly. The defendant then files a timely motion for a new trial under FRCP 59. A few days later, the district court issues a five page memorandum denying the motion and describing the reasons for doing so. Has the time for the defendant to appeal the judgment begun to run?

If FRCP 58 does *not* apply, the answer is "yes." The defendant must file a notice of appeal within 30 days.

If FRCP 58 *does* apply, the answer is "no," because the order denying the new trial motion was not "set forth on a separate document." Until the order *is* entered in compliance with FRCP 58, the time for the defendant to appeal continues to be tolled. In theory, the defendant could wait 20 or 30 years, move the court to enter its order denying the new trial motion in the form required by FRCP 58, and then appeal the 20 or 30 year old judgment. This result is dictated by a literal reading of FRAP 4(a)(7), which states that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with [FRCP] 58."

Mr. Munford said that this question arises with some frequency, because when courts *deny* the post-judgment motions listed in FRAP 4(a)(4)(A), they usually do so in orders that describe the reasons for the denial. Those orders are not "entered in compliance with Rule[] 58" for purposes of FRAP 4(a)(7) because they are not usually "set forth on a separate document." By contrast, this issue does not often arise when courts issue orders *granting* post-judgment motions, as such orders — which generally direct that a judgment be vacated or amended — are usually entered in compliance with FRCP 58.

According to Mr. Munford, the circuits have split badly on the "applicability" question:

a. The First and Fifth Circuits (as well as at least one decision of the Ninth) hold that FRCP 58 always applies to orders disposing of post-judgment motions. Thus, in theory, if a district court does not enter its order denying such a motion on a separate document as required by FRCP 58, the losing party can wait forever to appeal. When the party decides that it wants to appeal, it need merely ask the district court to enter its (very old) order denying the post-judgment motion on a separate document and, after the district court does so, the party will have 30 days to appeal the (very old) judgment. In order to prevent that result, the First Circuit invented a "three month rule" — that is, the First Circuit, without any textual support in FRAP, held that a party loses its right to request the district court to enter an order on a separate document (thus triggering the 30 day time to appeal) three months after receiving notice of the order.

b. The Second and Seventh Circuits (as well as at least one decision of the Ninth) hold that FRCP 58 applies when post-judgment relief is *granted*, but not when such relief is *denied*. In other words, when the district court *grants* a motion for post-judgment relief, the time to appeal does not begin to run until the district court enters its order in compliance with FRCP 58. When a district court *denies* a motion for post-judgment relief, the time to appeal begins to run, even if the order denying the relief does not comply with FRCP 58.

c. The Eleventh Circuit holds that FRCP 58 never applies to motions for post-judgment relief. Whether such a motion is granted or denied, the time to appeal begins to run as soon as the order is entered, whether or not the order complies with FRCP 58. This, of course, is contrary to the literal terms of FRAP 4(a)(7).

2. The "Prematurity" Question: If FRCP 58 applies to the "order" referred to in FRAP 4(a)(4)(A) — that is, if the time to bring an appeal in a civil case does not begin to run until an

order granting or denying post-judgment relief is entered in compliance with FRCP 58 — what happens if a party brings an appeal *before* such an order is entered?

Suppose that, in a diversity case arising out of an automobile accident, the jury returns a verdict for the plaintiff, and the district court enters judgment accordingly. The defendant then files a timely motion for a new trial under FRCP 59. A few days later, the district court issues a five page memorandum denying the motion and describing the reasons for doing so. The district court is in a circuit that holds that the time to appeal does not begin to run until the order denying the motion for post-judgment relief is entered in compliance with FRCP 58, so, at this point, the time to appeal has not begun to run. What happens if the defendant nevertheless files a notice of appeal, without first asking the district court to enter its order in compliance with FRCP 58?

According to Mr. Munford, the circuits have also split on the "prematurity" question:

a. Some circuits dismiss the appeal. Essentially, they instruct the appellant to go back to the district court, ask the court to enter its order denying post-judgment relief in a form that complies with FRCP 58, and then appeal again.

b. Other circuits apply a "one way waiver" doctrine. If the party who lost below brings a "premature" appeal, the appeal is allowed to proceed. These circuits consider it a waste of time to dismiss an appeal, only to have the appellant get a FRCP 58 order from the district court and appeal again. However, if the party who lost below wishes to do so, she can choose not to appeal until the district court's order denying her motion for post-judgment relief is entered in compliance with FRCP 58. Again, in theory, the party could wait forever. In the view of these circuits, if the winner wants to protect against that possibility, the winner should make certain that the district court enters its order in compliance with FRCP 58.

3. The "Timing" Question: Mr. Munford briefly mentioned one other complication:

Suppose that, in a diversity case arising out of an automobile accident, the jury returns a verdict for the plaintiff, and the district court enters judgment accordingly. The defendant then files a timely motion to amend the judgment under FRCP 59. On June 1, the district court issues an order granting the motion, and instructs the clerk to amend the judgment. On June 3, the judgment is actually amended. When did the time for appeal begin to run? On June 1 or on June 3? Does it matter whether the June 1 order was entered in compliance with FRCP 58?

Mr. Munford did not describe any case law on this question, but said the Committee should address this question if the Committee amends FRAP 4 to address the "applicability" and "prematurity" questions.

Mr. Munford distributed a proposal for amending FRAP 4. Under Mr. Munford's proposal, the three questions would be answered in the following ways:

a. The "Applicability" Question: FRCP 58 would apply to all judgments and orders, except for orders denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A). The

time to appeal would begin to run upon entry of such orders, even if they were not entered in compliance with FRCP 58.

b. The "Prematurity" Question: The "one way waiver" doctrine would be incorporated into FRAP. When motions for post-judgment relief were *denied* by an order that did not comply with FRCP 58, there would be no need for a "waiver" doctrine, as, under Mr. Munford's first proposal, the time to appeal would begin to run immediately. Thus, an appeal could not be "premature." When motions for post-judgment relief were *granted*, however, a "premature" appeal would still be possible.

Under Mr. Munford's proposal, if an order granting post-judgment relief does not comply with FRCP 58, the rights of the parties to appeal would be preserved until 30 days after a FRCP 58 order was entered. In theory, an appeal could be brought many years later, but, in practice, that is highly unlikely to occur. If a party brought a "premature" appeal — that is, if a party filed a notice of appeal before the order granting post-judgment relief was entered in compliance with FRCP 58 — the appeal would be permitted to proceed.

c. The "Timing" Question: Under Mr. Munford's proposal, the time to appeal would begin to run from the date that the judgment was amended, and not from the date that the court ordered the judgment to be amended.

After a brief discussion, the Committee reached a consensus that, in principle, it agreed with Mr. Munford's proposal, but desired to give it more study. A member moved that the proposal be placed on the agenda for the Committee's October meeting as an "action" item. The motion was seconded. The motion carried (unanimously).

H. Items Awaiting Initial Discussion and Prioritization

The Committee postponed until October consideration of all items that were awaiting initial discussion, with one exception: The Committee briefly discussed Item No. 97-32, a proposal from the Methods Analysis Program that FRAP 12(a) be amended so that appellate cases no longer had to be docketed "under the title of the district-court action." Instead, the caption for an appellate case would reflect only the names of those who were actually parties to the appeal.

Mr. Fulbruge introduced the proposal, and began to field questions about it, when Judge Garwood interrupted to ask whether, given that it was after 5:00 p.m., the Committee wanted to defer further discussion of Item No. 97-32 and the other items awaiting initial discussion until tomorrow or until the October meeting.

A member moved that discussion of Item No. 97-32 and the other items awaiting initial discussion be postponed until the October meeting. The motion was seconded. The motion carried (unanimously).

VI. Additional Old Business and New Business (If Any)

No additional old business or new business was raised.

VII. Scheduling of Dates and Location of Fall 1998 Meeting

The Committee agreed that it will meet in New Orleans on October 15 and 16, 1998.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 5:10 p.m.

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter

Reporter's Note: Attached as an appendix to these minutes are copies of all amendments and ACNs approved by the Committee. In some cases, the Committee may have approved an amendment or ACN upon the understanding that it would be redrafted in a particular way, but the Committee has not yet reviewed the redrafted version.

APPENDIX

To the Minutes of the Spring 1998 Meeting of the Advisory Committee on Appellate Rules

Reporter's Note: This appendix contains copies of all amendments to the Federal Rules of Appellate Procedure and Advisory Committee Notes approved by the Advisory Committee on Appellate Rules at its spring 1998 meeting. In some cases, the Committee may have approved an amendment or Note upon the understanding that it would be redrafted in a particular way, but the Committee has not yet reviewed the redrafted version.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

Advisory Committee Note

Subdivision 4(a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations in Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character

as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, ___ (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) Motion in the District Court. Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) Action on the Motion. If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless the law requires otherwise. If the district court denies the motion, it must state its reasons in writing.

Advisory Committee Note

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

Rule 27. Motions

(d) Form of Papers; Page Limits; and Number of Copies

(1) **Format.**

(B) A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

Advisory Committee Note

Subdivision (d)(1)(B). A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

Rule 28. Briefs

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 250 words. Any response must be made promptly and must be similarly limited.

Advisory Committee Note

Subdivision (j). In the past, Rule 28(j) has required parties to describe supplemental authorities "without argument." Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing "state[ment] . . . [of] the reasons for the supplemental citations," which is required, from "argument" about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids "argument." Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a Rule 28(j) letter — that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close — cannot exceed 250 words. All words found in footnotes will count toward the 250 word limit.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; ~~and~~ any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

Advisory Committee Note

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed — or adequately addressed — in the principal briefs. Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of Brief.

(7) **Length.**

(C) **Certificate of compliance.**

(i) A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule 32(a)(7)(C)(i).

Advisory Committee Note

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

Rule 32. Form of Briefs, Appendices, and Other Papers

(c) Form of Other Papers.

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A ~~a~~ cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)~~;~~. If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

Advisory Committee Note

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

(a) Constitutional Challenge to Federal Statute. If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Advisory Committee Note

Rule 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. But § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) **Adoption and Amendment.**

(A) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(B) Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is ~~promulgated~~ adopted or amended. A local rule must not be enforced before it is received by the Administrative Office of the United States Courts.

(C) An amendment to the local rules of a court of appeals must take effect on the December 1 following its adoption, unless a majority of the court's judges in regular active service determines that there is an immediate need for the amendment.

Advisory Committee Note

Subdivision (a)(1). Rule 47(a)(1) has been divided into subparts. Former Rule 47(a)(1), with the exception of the final sentence, now appears as Rule 47(a)(1)(A). The final sentence of former Rule 47(a)(1) has become the first sentence of Rule 47(a)(1)(B).

Two substantive changes have been made to Rule 47(a)(1). First, the second sentence of Rule 47(a)(1)(B) has been added to bar the enforcement of any local rule — or any change to any local rule — prior to the time that it is received by the Administrative Office of the United States Courts. Second, Rule 47(a)(1)(C) has been added to provide a uniform effective date for changes to local rules. Such changes will take effect on December 1 of each year, absent exigent circumstances.

The changes to Rule 47(a)(1) are prompted by the continuing concern of the bench and bar over the proliferation of local rules. That proliferation creates a hardship for attorneys who practice in more than one court of appeals. Not only do those attorneys have to become familiar with several sets of local rules, they also must be continually on guard for changes to the local rules. In addition, although Rule 47(a)(1) requires that local rules be sent to the Administrative Office, compliance with that directive has been inconsistent. By barring enforcement of any rule that has not been received by the Administrative Office, the Committee hopes to increase compliance with Rule 47(a)(1) and to ensure that current local rules of all of the courts of appeals are available from a single source.

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☐ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

Advisory Committee on Appellate Rules
Table of Agenda Items — Revised May 1998

FRAP Item	Proposal	Source	Current Status
95-3	Amend FRAP 15(f) to conform to new FRAP 4(a)(4)(B)(i).	Hon. Stephen F. Williams (CADC)	Awaiting initial discussion Retained in part on agenda with medium priority 9/97
95-4	Amend computation of time to conform to Civil Rules method. (Related to No. 97-1.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Discussed and retained on agenda 4/98
95-7	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period. (Related to No. 96-2.)	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97
96-2	Amend FRAP 4(b) so that an extension of time to file a notice of appeal can be granted in a criminal case even without excusable neglect. (Related to No. 95-7.)	Hon. Richard A. Posner (CA7)	Awaiting initial discussion Retained on agenda with low priority 9/97
97-1	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to No. 95-4.)	Advisory Committee & Los Angeles County Bar Assn.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Discussed and retained on agenda 4/98
97-4	Amend FRAP 15(c)(1) re: informal rulemaking.	Advisory Committee & Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97
97-5	Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-7	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-9	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98

FRAP Item	Proposal	Source	Current Status
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.	Standing Committee	Awaiting initial discussion Retained on agenda with low priority 9/97 Discussed and retained on agenda 4/98
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with high priority 9/97
97-19	Amend FRAP 4(b)(1)(B)(ii) to clarify whether, in multi-defendant criminal cases, the government must file its notice of appeal within 30 days after the *first* notice of appeal is filed by a defendant or within 30 days after the *last* notice of appeal is filed by a defendant.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 9/97
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion Draft approved 9/97 for submission to Standing Committee after 12/1/98
97-22	Amend FRAP 34(a)(1) to establish a uniform federal rule governing party statements as to whether oral argument should or should not be permitted.	Advisory Committee	Awaiting initial discussion Retained on agenda with medium priority 9/97
97-30	Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with high priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-32	Amend FRAP 12(a) to require the appellate caption to identify only the parties to the appeal.	Methods Analysis Program	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
97-33	Amend FRAP 3(c) to require that an appellant file with the notice of appeal a statement identifying all appellants, all appellees, and counsel for all represented parties.	Methods Analysis Program	Awaiting initial discussion
97-34	Amend FRAP 3(d)(1) to specify when the district clerk must forward updated docket entries to the appellate clerk.	Methods Analysis Program	Awaiting initial discussion
97-35	Amend unspecified rules to establish uniform standards for the docketing of complex cases by district courts, bankruptcy courts, and BAPs.	Methods Analysis Program	Awaiting initial discussion
97-36	Amend FRAP 25(a)(4) to permit the clerk to refuse to accept for filing documents that do not comply with the rules.	Methods Analysis Program	Awaiting initial discussion
97-37	Amend unspecified rules to require counsel who represents a criminal defendant at trial to continue to represent the defendant on appeal unless relieved by the appellate court. (Related to No. 97-38.)	Methods Analysis Program	Awaiting initial discussion
97-38	Amend unspecified rules to prohibit district courts from permitting counsel who has represented a criminal defendant at trial to withdraw before a notice of appeal is filed. (Related to No. 97-37.)	Methods Analysis Program	Awaiting initial discussion
97-39	Amend FRAP 15(c) to require the petitioner to list respondents and to attach a copy of the agency order to the petition for review.	Methods Analysis Program	Awaiting initial discussion
97-40	Amend unspecified rules to require advance notice and pre-filings in state and federal death penalty cases.	Methods Analysis Program	Awaiting initial discussion
97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Solicitor General Waxman	Awaiting initial discussion Draft approved 4/98 for submission to Standing Committee after 12/1/98

FRAP Item	Proposal	Source	Current Status
97-42	Amend FRAP 3(d) to permit clerk to serve notice of filing of appeal by fax or e-mail.	Michael E. Kunz Michael N. Milby William S. Brownell District Court Clerks	Awaiting initial discussion
97-43	Amend FRAP 22 to prescribe a time period for seeking a certificate of appealability.	John J. McCarthy	Awaiting initial discussion
97-44	Amend unspecified rules to permit appeal of district court's refusal to stay enforcement of judgment pending resolution of post-trial motions.	Michael F. Dahlen, Esq.	Awaiting initial discussion
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office.	Standing Committee	Awaiting initial discussion Draft approved 4/98 for submission to Standing Committee after 12/1/98
98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A). (Related to former item No. 95-08)	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 4/98
98-03	Amend FRAP 29(e) to increase the time for amici to file their briefs and to clarify the status of local rules on amicus briefs, and amend FRAP 31(a)(1) so that the time to file a reply brief runs from the filing of the amicus brief rather than the service of the appellee's brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion

Item 6A

TO: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 11, 1998

RE: Report of the Advisory Committee on Bankruptcy Rules

Introduction

The Advisory Committee on Bankruptcy Rules met on March 26-27, 1998, at the Winrock International Conference Center in Morrilton, Arkansas.[1] The Advisory Committee considered public comments regarding proposed amendments to 16 Bankruptcy Rules that were published in August, 1997, and, after making certain revisions, approved the proposed amendments for presentation to the Standing Committee for final approval and transmission to the Judicial Conference.

The Advisory Committee also approved a preliminary draft of proposed amendments that would substantially revise procedures relating to litigation (other than adversary proceedings) in bankruptcy cases. In addition to complete revisions of Rules 9013 (motions) and 9014 (contested matters), related amendments are proposed for 25 other rules. This "Litigation Package" of proposed amendments will be presented to the Standing Committee at the June 1998 meeting with a request that they be published for comment by the bench and bar. To assist the Standing Committee and the public, the Advisory Committee has prepared an "Introduction" to explain these amendments, which the Committee recommends be published with the proposed amendments.

The Advisory Committee also approved a preliminary draft of proposed amendments to six Bankruptcy Rules and two Official Bankruptcy Forms that are not related to the Litigation Package. The Advisory Committee will also present these proposed amendments to the Standing Committee at its June 1998 meeting with a request that they be published for comment.

The preliminary drafts of proposed amendments that will be presented to the Standing Committee for final approval and transmission to the Judicial Conference, or for publication for comment, are set forth as "Action Items" in this report.

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[1]Near the Rasputin Mule Farm.

The Standing Committee has requested that the Advisory Committee consider certain questions relating to attorney conduct, local rules, electronic submission of public comments, and the rules promulgation timetable. The Advisory Committee's responses regarding these issues are discussed as "Information Items" in this report.

I. Action Items

A. Proposed Amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014, Submitted for Final Approval by the Standing Committee and Transmittal to the Judicial Conference.

1. *Public Comment.*

The Preliminary Draft of the Proposed Amendments to the Federal Rules of Bankruptcy Procedure and related committee notes were published for comment by the bench and bar in August 1997.

The public hearing scheduled for January 30, 1998, was canceled for lack of witnesses, but the Advisory Committee received letters from 18 commentators. One commentator, Jack E. Horsley, Esq., of Illinois, commented generally that he favors all the proposed amendments. The other 17 commentators offered specific comments or suggestions relating to one or more of the published amendments. These letters are summarized on a rule-by-rule basis following the text of each rule in the GAP Report (see pages 6-37 below). These comments and recommendations were reviewed at the Advisory Committee meeting in Arkansas and, as a result, several revisions were made to the published draft. These post-publication revisions are identified in the GAP Report.

2. *Synopsis of Proposed Amendments:*

(a) Rule 1017 is amended to specify the parties entitled to notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of creditors, schedules, and statement of financial affairs. Currently, all creditors are entitled to

notice of a hearing on the motion if it is a chapter 7 case. To avoid the expense of sending notice to all creditors, the proposed amendments provide that the debtor, the trustee, and any other entities specified by the court, are the only parties entitled to notice. The rule is amended further to provide that a motion to suspend all proceedings in a case or to dismiss a case for substantial abuse of chapter 7 is governed by Rule 9014. Other amendments are stylistic or designed to delete redundant provisions that are covered by other rules.

(b) Rule 1019 is amended (1) to clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time expires; (2) to provide that the holder of a postpetition, preconversion administrative expense claim is required to file a request for payment under § 503(a) of the Code, rather than a proof of claim under Rule 3002; (3) to provide that the court may fix a time for filing preconversion administrative expense claims; and (4) to conform the rule to the 1994 amendment to § 502(b)(9) and to the 1996 amendment to Rule 3002(c)(1) regarding the 180-day period for filing a claim of a governmental unit. Other amendments are stylistic.

(c) Rule 2002(a)(4) is amended to delete the requirement that notice of a hearing on dismissal of a chapter 7 case based on the debtor's failure to file required lists, schedules, and statements, must be sent to all creditors. This amendment conforms to the proposed amendments to Rule 1017 which requires that the notice be sent only to certain parties. This subdivision is amended further to delete the requirement that notice of a hearing on dismissal of a case based on the debtor's failure to pay the filing fee must be sent to all creditors. Rule 2002(f) is amended to provide for notice of the suspension of proceedings under § 305 of the Code.

(d) Rule 2003(d) is amended to require the United States trustee to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. Also, the amended rule gives a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve

the dispute. These amendments and other stylistic revisions are designed to conform to the 1997 amendments to Rule 2007.1(b)(3) on the election of a trustee in a chapter 11 case.

(e) Rule 3020(e) is added to automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

(f) Rule 3021 is amended to conform to the amendments to Rule 3020 regarding the ten-day stay of an order confirming a plan in a chapter 9 or chapter 11 case. The other amendments are stylistic.

(g) Rule 4001(a)(3) is added to automatically stay for ten days an order granting relief from an automatic stay so that parties will have sufficient time to request a stay pending appeal.

(h) Rule 4004(a) is amended to clarify that the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for filing a complaint objecting to discharge must be filed before the time has expired. Other amendments are stylistic.

(i) Rule 4007 is amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. This rule is amended further to clarify that a motion for an extension of time for filing a complaint must be filed before the time has expired. Other amendments are stylistic.

(j) Rule 6004(g) is added to automatically stay for ten days an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

(k) Rule 6006(d) is added to automatically stay for ten days an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) so

that parties will have sufficient time to request a stay pending appeal.

(l) Rule 7001 is amended to recognize that an adversary proceeding is not necessary to obtain injunctive or other equitable relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan. Other amendments are stylistic.

(m) Rule 7004(e) is amended to provide that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country.

(n) Rule 7062 is amended to delete the additional exceptions to Rule 62(a) F.R. Civ. P. The deletion of these exceptions -- which are orders issued in contested matters rather than adversary proceedings -- is consistent with the amendment to Rule 9014 that renders Rule 7062 inapplicable to contested matters. For proposed amendments that provide a new automatic ten-day stay of certain orders, see the amendments to Rules 3020, 3021, 4001, 6004, and 6006.

(o) Rule 9006(b)(2) is amended to conform to the abrogation of Rule 1017(b)(3).

(p) Rule 9014 is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter. Rule 7062, which provides that Rule 62 F.R.Civ.P. is applicable in adversary proceedings, is not appropriate for most orders granting or denying motions governed by Rule 9014. For proposed amendments that provide a new automatic ten-day stay of certain orders so that parties will have sufficient time to obtain a stay pending appeal, see the amendments to Rules 3020, 3021, 4001, 6004, and 6006.

3. *Text of Proposed Amendments Presented to the Standing Committee for Approval and Transmission to the Judicial Conference, GAP Report, and Summaries of Public Comments on Published Draft:*

Rule 1017. Dismissal or Conversion of Case; Suspension

(a) VOLUNTARY DISMISSAL; DISMISSAL FOR WANT OF PROSECUTION OR OTHER CAUSE. Except as provided in §§ 707(a)(3), 707(b), 1208(b), and 1307(b) of the Code, and in Rule 1017(b), (c), and (e), a case shall not be dismissed on motion of the petitioner, ~~or~~ for want of prosecution or other cause, or by consent of the parties, before ~~prior to~~ a hearing on notice as provided in Rule 2002. For ~~such~~ the purpose of the notice, the debtor shall file a list of ~~all~~ creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the debtor or another entity to prepare and file it ~~the preparing and filing by the debtor or other entity~~.

(b) DISMISSAL FOR FAILURE TO PAY FILING FEE.

(1) ~~For failure to pay any installment of the filing fee,~~ If any installment of the filing fee has not been paid, the court may, after a hearing on notice to the debtor and the trustee, dismiss the case.

(2) If the case is dismissed or ~~the case~~ closed without full payment of the filing fee, the installments collected shall be

distributed in the same manner and proportions as if the filing fee had been paid in full.

~~(3) Notice of dismissal for failure to pay the filing fee shall be given within 30 days after the dismissal to creditors appearing on the list of creditors and to those who have filed claims, in the manner provided in Rule 2002.~~

(c) DISMISSAL OF VOLUNTARY CHAPTER 7 OR CHAPTER 13 CASE FOR FAILURE TO TIMELY FILE LIST OF CREDITORS, SCHEDULES, AND STATEMENT OF FINANCIAL AFFAIRS. The court may dismiss a voluntary chapter 7 or chapter 13 case under § 707(a)(3) or § 1307(c)(9) after a hearing on notice served by the United States trustee on the debtor, the trustee, and any other entities as the court directs.

~~(c)~~ (d) SUSPENSION. The court shall not dismiss a case or suspend proceedings under § 305 before ~~A case shall not be dismissed or proceedings suspended pursuant to § 305 of the Code prior to~~ a hearing on notice as provided in Rule 2002(a).

~~(d) PROCEDURE FOR DISMISSAL OR CONVERSION. A proceeding to dismiss a case or convert a case to another chapter, except pursuant to §§706(a), 707(b), 1112(a), 1208(a) or (b), or 1307(a) or (b) of the Code, is governed by Rule 9014. Conversion or dismissal pursuant to §§706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served~~

~~as required by Rule 9013. A chapter 12 or chapter 13 case shall be converted without court order on the filing by the debtor of a notice of conversion pursuant to §§1208(a) or 1307(a), and the filing date of the notice shall be deemed the date of the conversion order for the purposes of applying §348(c) of the Code and Rule 1019. The clerk shall forthwith transmit to the United States trustee a copy of the notice.~~

(e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. The court may dismiss an ~~An~~ individual debtor's case ~~may be dismissed~~ for substantial abuse ~~pursuant to~~ under § 707(b) only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and ~~such~~ any other ~~parties in interest~~ entities as the court directs.

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee ~~shall be filed no later than~~ only within 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a), unless, before the ~~such~~ time has expired, the court for cause extends the time for filing the motion. ~~The motion shall advise the debtor of~~ The United States trustee shall set forth in the motion all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is set on the court's own motion, notice

~~thereof~~ of the hearing shall be served on the debtor ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~pursuant to~~ under § 341(a). The notice shall ~~advise the debtor of~~ set forth all matters to be considered by the court at the hearing.

(f) PROCEDURE FOR DISMISSAL, CONVERSION, OR SUSPENSION.

(1) Rule 9014 governs a proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b).

(2) Conversion or dismissal under §§706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013.

(3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§1208(a) or 1307(a). The filing date of the notice becomes the date of the conversion order for the purposes of applying §348(c) and Rule 1019. The clerk shall promptly transmit a copy of the notice to the United States trustee.

COMMITTEE NOTE

Subdivision (b)(3), which provides that notice of dismissal for failure to pay the filing fee shall be sent to all creditors within 30 days after the dismissal, is deleted as unnecessary. Rule 2002(f) provides for notice to creditors of the dismissal of a case.

Rule 2002(a) and this rule currently require notice to all creditors of a hearing on dismissal of a voluntary chapter 7 case for the debtor's failure to file a list of creditors, schedules, and statement of financial affairs within the time provided in § 707(a)(3) of the Code. A new subdivision (c) is added to provide that the United States trustee, who is the only entity with standing to file a motion to dismiss under § 707(a)(3) or § 1307(c)(9), is required to serve the motion on only the debtor, the trustee, and any other entities as the court directs. This amendment, and the amendment to Rule 2002, will have the effect of avoiding the expense of sending notices of the motion to all creditors in a chapter 7 case.

New subdivision (f) is the same as current subdivision (d), except that it provides that a motion to suspend all proceedings in a case or to dismiss a case for substantial abuse of chapter 7 under § 707(b) is governed by Rule 9014.

Other amendments to this rule are stylistic or for clarification.

Public Comment on Rule 1017:

(1) Prof. Michael Anthony Sabino of St. John's University College of Business Administration, New York, opposes the amendments to Rule 1017(c). He believes that creditors should receive notice of a motion to dismiss the case for failure to file lists, schedules, or statements because creditors have knowledge regarding the debtor's intentions, good or bad faith, and reasons for the failure to file these documents, and they should be able to furnish the court with this information.

(2) New Jersey Bar Association, Bankruptcy Law Section, opposes the amendments to Rule 1017(c) because it believes that the amendment eliminates notice to creditors of the dismissal of the case based on the failure to file lists, schedules, and statements, and it is important for creditors to have this information so that they do not unnecessarily spend funds to move for other relief in the case.

(3) Wade H. Logan, III, Esq., of South Carolina, commenting as a member of the American College of Trial Lawyers, is in favor of the proposed amendments in that they provide "greater specificity in setting forth the identity of the parties entitled to notice of a motion to dismiss" for failing to file the list of creditors, schedules, or statement of financial affairs. But he suggests that notice also be given to any party that files a notice of appearance in the case.

(4) Litigation Committee, Bar Association of the District of Columbia, commented that the amendment that eliminates the need to give all creditors notice of a motion to dismiss for failure to file schedules is appropriate and will save unnecessary costs. But they disagree with the deletion of Rule 1017(b)(3), which requires the clerk to

give creditors notice of an order dismissing the case on this ground within 30 days after the dismissal. Rule 2002(f), which requires that notice of dismissal be sent to creditors regardless of the basis for dismissal, does not have a time limit.

(5) State Bar of California, Federal Courts Committee, supports the proposed amendments to Rules 1017(c).

(6) State Bar of California, Business Law Section, suggests that the list of entities specified in Rule 1017(c) (i.e., entities entitled to notice of a motion to dismiss a case for failure to file a list of creditors, schedules, or statement of financial affairs) should be expanded to include entities that have filed and served a request for special notice in the case. The letter also states that it is important that creditors receive notice that the case has been dismissed [Reporter's note: Rule 2002(f) requires that the clerk send creditors notice of the dismissal].

Gap Report on Rule 1017. No changes since publication, except for stylistic changes in Rule 1017(e) and (f).

Rule 1019. Conversion of a Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

(1) FILING OF LISTS, INVENTORIES, SCHEDULES, STATEMENTS.

* * * * *

(B) If a statement of intention is required, it ~~The statement of intention, if required,~~ shall be filed within 30 days ~~following~~ after entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. The court may grant an ~~An~~ extension of time ~~may be granted~~ for cause only on written motion filed, or oral request

made during a hearing, ~~motion made~~ before the time has expired. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

(6) ~~FILING OF~~ POSTPETITION CLAIMS; PRECONVERSION ADMINISTRATIVE EXPENSES; NOTICE. A request for payment of an administrative expense incurred before conversion of the case is timely filed under § 503(a) of the Code if it is filed before conversion or a time fixed by the court. If the request is filed by a governmental unit, it is timely if it is filed before conversion or within the later of a time fixed by the court or 180 days after the date of the conversion. A claim of a kind specified in § 348(d) may be filed in accordance with Rules 3001(a)-(d) and 3002. ~~On~~ Upon the filing of the schedule of unpaid debts incurred after commencement of the case and before conversion, the clerk, or some other person as the court may direct, shall give notice to those entities listed on the schedule of the time for filing a request for payment of an administrative expense and, unless a notice of insufficient assets to pay a dividend is mailed in accordance with Rule 2002(e), the time for filing a claim of a kind specified in § 348(d). ~~notice to those entities, including the United States, any state, or any subdivision~~

~~thereof, that their claims may be filed pursuant to Rules 3001(a)-(d) and 3002. Unless a notice of insufficient assets to pay a dividend is mailed pursuant to Rule 2002(c), the court shall fix the time for filing claims arising from the rejection of executory contracts or unexpired leases under §§ 348(c) and 365(d) of the Code.~~

* * * * *

COMMITTEE NOTE

Paragraph (1)(B) is amended to clarify that a motion for an extension of time to file a statement of intention must be made by written motion filed before the time expires, or by oral request made at a hearing before the time expires.

Subdivision (6) is amended to provide that a holder of an administrative expense claim incurred after the commencement of the case, but before conversion to chapter 7, is required to file a request for payment under § 503(a) within a time fixed by the court, rather than a proof of claim under § 501 and Rules 3001(a)-(d) and 3002. The 180-day period applicable to governmental units is intended to conform to § 502(b)(9) of the Code and Rule 3002(c)(1). It is unnecessary for the court to fix a time for filing requests for payment if it appears that there are not sufficient assets to pay preconversion administrative expenses. If a time for filing a request for payment of an administrative expense is fixed by the court, it may be enlarged as provided in Rule 9006(b). If an administrative expense claimant fails to timely file the request, it may be tardily filed under § 503(a) if permitted by the court for cause.

The final sentence of Rule 1019(6) is deleted because it is unnecessary in view of the other amendments to this paragraph. If a party has entered into a postpetition contract or lease with the trustee or debtor that constitutes an administrative expense, a timely request for payment must be filed in accordance with this paragraph and § 503(b) of the Code. The time for filing a proof of claim in connection with the rejection of any other executory contract or unexpired lease is governed by Rule 3002(c)(4).

The phrase "including the United States, any state, or any subdivision thereof" is deleted as unnecessary. Other amendments to this rule are stylistic.

Public Comment on Rule 1019.

(1) Association of the Bar of the District of Columbia, Litigation Committee, supports the amendment to Rule 1019(1)(b) in that it clarifies that a request to extend the time to file a statement of intention may be made orally at a hearing.

(2) James Gadsden, Esq., of New York, opposes the proposed amendment to Rule 1019(6) (regarding requests for payment of preconversion administrative expenses) and suggests that the "present procedure of permitting the filing of a proof of claim should be continued, at least for entities making claims for ordinary course of business expenses." He comments that requiring a claimant to file a request for payment places a substantial additional burden on the claimant because the claimant will have to prepare a more elaborate pleading and file a motion requesting payment. Also, parties are unlikely at that time to be able to determine the likelihood of a distribution with respect to preconversion administrative expense claims.

(3) Litigation Committee, Bar Association of the District of Columbia, opposes the amendment to Rule 1019(6). First, holders of small claims will not hire lawyers to file motions. Second, court dockets will be burdened by large numbers of motions seeking allowance of claims. Forcing claimants to file motions to establish priority is contrary to current practice, and is an "inefficient, burdensome and costly procedure upon both the Court and the creditors."

(4) Karen Cordry, Esq., of the District of Columbia, writing on her own behalf and not on behalf of National Association of Attorneys General (to which she is Bankruptcy Counsel), commented on the amendments to Rule 1019(6): (1) the committee note should alert practitioners that the deadline for filing preconversion administrative expense claims is new and did not exist before; (2) the amendment will require administrative expense claimants to file requests for payment even in no-asset cases; (3) why is there a need to have a bar date for preconversion administrative expense claims separate from a bar date for other administrative expenses set at the end of the case. "That said, I agree that it would be appropriate to provide a minimum period for filing of any expense request that should not be shorter than the time periods allotted deadline for filing a claim. The most appropriate deadline for such claims would be calculated from the confirmation date; however, it could be left up to the court to set an earlier date in special circumstances."

(5) New Jersey Bar Association, Bankruptcy Law Section, suggests that the proposed amendments to Rule 1019(6) be modified to provide that the 90-day deadline for filing administrative expense claims after conversion of the case shall apply only if the administrative expense claimant received prior notice of the date set for the meeting of creditors.

Gap Report on Rule 1019. The proposed amendments to Rule 1019(6) were changed

to delete the deadline for filing requests for payment of preconversion administrative expenses that would be applicable in all cases, and to provide instead that the court may fix such a deadline. The committee note was revised to clarify that it is not necessary for the court to fix a deadline where there are insufficient assets to pay preconversion administrative expenses.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY–DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

(1) the meeting of creditors under § 341 or § 1104(b) of the Code;

* * * * *

(4) in a chapter 7 liquidation, a chapter 11 reorganization case, or ~~and~~ a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case or the conversion of the case to another chapter, unless the hearing is under § 707(a)(3) or § 707(b) ~~of the Code~~ or is on dismissal of the case for failure to pay the filing fee~~, or the conversion of the case to another chapter~~;

* * * * *

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

* * * * *

(2) the dismissal or the conversion of the case to another chapter, or the suspension of proceedings under § 305;

* * * * *

COMMITTEE NOTE

Paragraph (a)(4) is amended to conform to the amendments to Rule 1017. If the United States trustee files a motion to dismiss a case for the debtor's failure to file the list of creditors, schedules, or the statement of financial affairs within the time specified in § 707(a)(3), the amendments to this rule and to Rule 1017 eliminate the requirement that all creditors receive notice of the hearing.

Paragraph (a)(4) is amended further to conform to Rule 1017(b), which requires that notice of the hearing on dismissal of a case for failure to pay the filing fee be served on only the debtor and the trustee.

Paragraph (f)(2) is amended to provide for notice of the suspension of proceedings under § 305.

Public Comment on Rule 2002. The proposed amendments to Rule 2002(a)(4) and Rule 1017(c) would eliminate notice to all creditors of a motion to dismiss for failure to file lists, schedules, or statements. Six letters were received commenting on these amendments. See "Public Comment to Rule 1017" above.

Gap Report on Rule 2002. No changes since publication.

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(d) REPORT OF ELECTION AND RESOLUTION OF DISPUTES IN A CHAPTER 7 CASE ~~TO THE COURT~~.

(1) *Report of Undisputed Election.* In a chapter 7 case, if the election of a trustee or a member of a creditors' committee is not

disputed, the United States trustee shall promptly file a report of the election, including the name and address of the person or entity elected and a statement that the election is undisputed.

(2) *Disputed Election.* If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. No later than the date on which the report is filed, the United States trustee shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. ~~The presiding officer shall transmit to the court the name and address of any person elected trustee or entity elected a member of a creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing that a dispute exists.~~ Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. ~~If no motion for the resolution of such election dispute is made to the court within 10 days after the date of the creditors' meeting,~~ Unless a motion for the resolution of the dispute is filed no later than 10 days after the United States trustee files a report of a disputed election for trustee, the interim trustee shall serve as trustee in the case.

* * * * *

COMMITTEE NOTE

Subdivision (d) is amended to require the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested a copy of it. Also, if the election is for a trustee, the rule as amended will give a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute.

The substitution of "United States trustee" for "presiding officer" is stylistic. Section 341(a) of the Code provides that the United States trustee shall preside at the meeting of creditors. Other amendments are designed to conform to the style of Rule 2007.1(b)(3) regarding the election of a trustee in a chapter 11 case.

Public Comment on Rule 2003.

(1) State Bar of California, Federal Courts Committee, supports the proposed amendments to Rule 2003(d).

(2) Association of the Bar of the District of Columbia, Litigation Committee, supports the amendment as providing "a more functional procedure to resolve disputed elections."

Gap Report on Rule 2003. No changes since publication.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

* * * * *

(e) STAY OF CONFIRMATION ORDER. An order confirming a plan is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (e) is added to provide sufficient time for a party to request a stay pending appeal of an order confirming a plan under chapter 9 or chapter 11 of the Code before the plan is implemented and an appeal becomes moot. Unless the court orders otherwise, any transfer of assets, issuance of securities, and cash distributions

provided for in the plan may not be made before the expiration of the 10-day period. The stay of the confirmation order under subdivision (e) does not affect the time for filing a notice of appeal from the confirmation order in accordance with Rule 8002.

The court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately. Alternatively, the court may order that the stay under Rule 3020(e) is for a fixed period less than 10 days.

Public Comment on Rule 3020.

(1) George C. Webster II, Esq., of California, wrote in support of this amendment. It will add a 10-day stay to Rule 3020 that will have the effect of "leveling the playing field by reducing the prospect of mooting by ambush...."

(2) William E. Shmidheiser, III, Esq., of Virginia, opposes the addition of the 10-day stay to Rule 3020. It would represent a fundamental shift in the way business is conducted in bankruptcy cases, slowing down the already slow pace of business and probably killing many otherwise barely-viable deals.

(3) Hon. Poly S. Higdon, Chief Bankruptcy Judge (D. Ore.), wrote that the bankruptcy judges in Oregon oppose the addition of the 10-day stay in Rule 3020. This area is often time sensitive. Judge Higdon recognizes that the court could order that the 10-day stay not apply, but notes that the court or the parties may forget to put that in the order. Acknowledging that Rule 7062 is ambiguous with respect to its application to orders in contested matters, Judge Higdon suggests that this problem can be cured simply by amending Rule 7062 and 9014 to delete the application of Rule 7062 in contested matters.

(4) Wade H. Logan, Esq., of South Carolina, opposes the addition of the 10-day stay in Rule 3020 to permit an opportunity to appeal. "This issue has not proven a problem in our district... [T]his requirement would simply add to what can often be a very time-consuming process inherent in the Bankruptcy system and is not justified."

(5) Litigation Committee, Bar Association of the District of Columbia, supports the 10-day stay added to the rule. These matters "involve a significant effect on the estate and its creditors which should be automatically stayed to provide time to perfect an appeal and obtain a stay pending appeal." Since the court would have discretion to impose or modify the stay, parties should not be prejudiced under the amended rules.

(6) New Jersey Bar Association, Bankruptcy Law Section, suggests that the new 10-day stay be modified to 3 days. Although they agree with the concept embodied in these amendments, severe economic or other prejudice could result from a 10-day

stay of these types of orders. Competing interests addressed in these proposed amendments can best be served by reducing 10 days to 3 days, which will be "sufficient in the vast majority of cases to afford an aggrieved party the opportunity to apply for a stay pending appeal and will insure that the other parties to the order are not unduly prejudiced."

Gap Report on Rule 3020. No changes since publication.

Rule 3021. Distribution Under Plan

Except as provided in Rule 3020(e), ~~After confirmation of a plan~~ after a plan is confirmed, distribution shall be made to creditors whose claims have been allowed, to interest holders whose interests have not been disallowed, and to indenture trustees who have filed claims ~~pursuant to~~ under Rule 3003(c)(5) that have been allowed. For ~~the purpose~~ purposes of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution, unless a different time is fixed by the plan or the order confirming the plan.

COMMITTEE NOTE

This amendment is to conform to the amendments to Rule 3020 regarding the ten-day stay of an order confirming a plan in a chapter 9 or chapter 11 case. The other amendments are stylistic.

Public Comment on Rule 3021. This amendment merely conforms to the amendments to Rule 3020. See "Public Comment to Rule 3020."

Gap Report on Rule 3021. No changes since publication.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use,

Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY.

* * * * *

(3) STAY OF ORDER. An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

* * * * *

COMMITTEE NOTE

Paragraph (a)(3) is added to provide sufficient time for a party to request a stay pending appeal of an order granting relief from an automatic stay before the order is enforced or implemented. The stay under paragraph (a)(3) is not applicable to orders granted ex parte in accordance with Rule 4001(a)(2).

The stay of the order does not affect the time for filing a notice of appeal in accordance with Rule 8002. While the enforcement and implementation of an order granting relief from the automatic stay is temporarily stayed under paragraph (a)(3), the automatic stay continues to protect the debtor, and the moving party may not foreclose on collateral or take any other steps that would violate the automatic stay.

The court may, in its discretion, order that Rule 4001(a)(3) is not applicable so that the prevailing party may immediately enforce and implement the order granting relief from the automatic stay. Alternatively, the court may order that the stay under Rule 4001(a)(3) is for a fixed period less than 10 days.

Public Comment on Rule 4001.

(1) George C. Webster II, Esq., of California, wrote in support of this amendment. It will add a 10-day stay that will have the effect of "leveling the playing field by reducing the prospect of mooting by ambush...."

(2) William E. Shmidheiser, III, Esq., of Virginia, opposes the addition of the 10-day stay. It would represent a fundamental shift in the way business is conducted in

bankruptcy cases, slowing down the already slow pace of business and probably killing many otherwise barely-viable deals.

(3) Hon. Poly S. Higdon, Chief Bankruptcy Judge (D. Ore.), wrote that the bankruptcy judges in Oregon oppose the addition of the 10-day stay in Rule 4001(a). This area is often time sensitive. Judge Higdon recognizes that the court could order that the 10-day stay not apply, but notes that the court or the parties may forget to put that in the order.

(4) Wade H. Logan, Esq., of South Carolina, opposes the addition of the 10-day stay in Rule 4001(a) to permit an opportunity to appeal. "This issue has not proven a problem in our district... [T]his requirement would simply add to what can often be a very time-consuming process inherent in the Bankruptcy system and is not justified."

(5) Litigation Committee, Bar Association of the District of Columbia, supports the 10-day stay added to the rule. These matters "involve a significant effect on the estate and its creditors which should be automatically stayed to provide time to perfect an appeal and obtain a stay pending appeal." Since the court would have discretion to impose or modify the stay, parties should not be prejudiced under the amended rules.

(6) New Jersey Bar Association, Bankruptcy Law Section, suggests that the new 10-day stay be modified to 3 days. Although they agree with the concept embodied in these amendments, severe economic or other prejudice could result from a 10-day stay of these types of orders. Competing interests addressed in these proposed amendments can best be served by reducing 10 days to 3 days, which will be "sufficient in the vast majority of cases to afford an aggrieved party the opportunity to apply for a stay pending appeal and will insure that the other parties to the order are not unduly prejudiced."

(7) Hon. David N. Naugle, Bankruptcy Judge (C.D. Cal.), wrote that the proposed 10-day stay of orders granting relief from the automatic stay in foreclosure and unlawful detainers will vastly increase the number of cases filed and the misuse of the automatic stay.

(8) Hon. Leslie Tchaikovsky, Bankruptcy Judge (N.D. Cal.), opposes the proposed amendment to Rule 4001(a). "It would prejudice many to benefit only a few." In most cases, "each day of delay represents a quantifiable dollar loss to the creditor." Debtors do not often appeal such orders; "more often, they file a new bankruptcy case, thereby invoking a new automatic stay". When a debtor wishes to appeal, he or she may request a stay pending appeal.

(9) Arthur L. Rolston, Esq., of California, suggests that the new 10-day stays that will

be added to Rules 4001(a) apply to matters that are actually contested. If the matter is uncontested, the order should be effective immediately unless the court orders otherwise.

(10) Eugene E. Derryberry, Esq., of Virginia, opposes the proposed amendment to Rule 4001(a). Creditors file relief from stay motions only when the debtor is in serious default, and usually a consent order is entered without a hearing. In many cases in which an agreed order cannot be obtained, "the debtor has been engaged in delaying tactics such as serial filings without ever proposing a Chapter 13 plan or making any payments...." The proposed amendment "grants an unreasonable delay to debtors who do not need or deserve such protection." He lists factors that the Committee should consider: (1) competent counsel for the debtor could obtain a stay pending appeal when appropriate; (2) the proposed rule is "in effect *ex parte*" with none of the showings usually made in considering stays; (3) the proposed rule "unfairly tilts the playing field against secured creditors" in favor of "bad faith filers;" (4) the imposition of sanctions for frivolous appeals "is an illusory deterrent seldom obtainable;" and (5) "the stay of a consent or agreed order is manifestly inappropriate."

(11) Prof. Anthony Michael Sabino of St. John's University College of Business Administration, New York, opposes the proposed amendment to Rule 4001(a)(3). A mandatory stay would "work exclusively to the significant harm of innocent creditors, would be of no value to the vast majority of debtors who do not appeal, and would be of inconsequential benefit to debtors who do appeal stay relief motions." These new 10-day stays will be a burden overly harmful to the bankruptcy system.

(12) State Bar of California, Federal Courts Committee, opposes the amendment. There is no justification for shifting the post-order burden. "[A]ll the proposed amendments do is to transfer the burden of requesting post-ruling relief from the losing party to the prevailing party. This shift is not wanted, warranted, or desirable.

(13) State Bar of California, Business Law Section, does not oppose the amendment, but commented that the language in proposed Rule 4001(a)(3) "unless the court orders otherwise" could cause confusion, and suggests that imposition of the stay should be "the rule" which should not be changed unless an extremely high standard (i.e., irreparable harm) is met, and urges the Advisory Committee to clarify in the committee notes that, absent exigent circumstances, judges should not have discretion to potentially moot an appeal to "get the deal done." Also, the committee note should state that the court may reduce the ten-day period, but may not extend it (except perhaps for extraordinary cause).

Gap Report on Rule 4001. No changes since publication.

Rule 4004. Grant or Denial of Discharge

(a) TIME FOR FILING COMPLAINT OBJECTING TO DISCHARGE; NOTICE OF TIME FIXED. In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). In a chapter 11 reorganization case, ~~such~~ the complaint shall be filed ~~not~~ no later than the first date set for the hearing on confirmation. ~~Not less than 25 days~~ At least 25 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k), and to the trustee and the trustee's attorney.

(b) EXTENSION OF TIME. On motion of any party in interest, after hearing on notice, the court may ~~extend~~ for cause extend the time to file ~~for filing~~ a complaint objecting to discharge. The motion shall be ~~made~~ filed before ~~such~~ the time has expired.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to clarify that, in a chapter 7 case, the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint objecting to discharge in accordance with Rule 4004(b).

The substitution of the word "filed" for "made" in subdivision (b) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of

applying these rules. *See*, e.g., *In re Coggin*, 30 F.3d 1443 (11th Cir. 1994). As amended, this rule requires that a motion for an extension of time for filing a complaint objecting to discharge be *filed* before the time has expired.

Other amendments to this rule are stylistic.

Public Comment on Rule 4004.

(1) William E. Shmidheiser, III, Esq., of Virginia, opposes the proposed amendments providing that the 60-day deadlines in Rules 4004 and 4007 run from the first date scheduled for the meeting of creditors. He suggests that these 60-day periods start from the date on which the meeting is actually held. Creditors often use the meeting of creditors to weigh whether or not they want to file a complaint under these rules. "Often what appear to be suspicious circumstances turn out to be easily explained or clarified by the debtor" at the meeting, persuading the creditor not to pursue the matter further. The proposed amendment might lead to more complaints for exception to discharge being filed.

(2) Wade H. Logan, III, of South Carolina, commented that amendments to Rules 4004 and 4007 to require a motion for an extension of time to be *filed* before the time expires are "well reasoned," but that they present an excellent opportunity to set forth further guidance on the effect of the expiration of the time before the hearing on the extension motion.

(3) Association of the Bar of the District of Columbia, Litigation Committee, wrote that the amendments to Rules 4004 and 4007 are appropriate and that they "address confusion under the current rules, especially where the initial meeting is not held on the scheduled date."

(4) State Bar of California, Federal Courts Committee, supports the proposed amendments to Rules 4004 and 4007.

(5) State Bar of California, Business Law Section, supports the proposed amendments to Rule 4007(c) and (d).

Gap Report on Rule 4004. No changes since publication.

Rule 4007. Determination of Dischargeability of a Debt

* * * * *

(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN A

CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, OR ~~AND~~ CHAPTER 12 FAMILY FARMER'S DEBT ADJUSTMENT ~~CASES~~ CASE; NOTICE OF TIME FIXED. A complaint to determine the dischargeability of ~~any~~ a debt ~~pursuant to~~ under § 523(c) ~~of the Code~~ shall be filed ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). The court shall give all creditors ~~not~~ no less than 30 ~~days~~ days' notice of the time so fixed in the manner provided in Rule 2002. On motion of ~~any~~ a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be ~~made~~ filed before the time has expired.

(d) TIME FOR FILING COMPLAINT UNDER § 523(c) IN A CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASE ~~CASES~~; NOTICE OF TIME FIXED. On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing ~~a time for the filing of~~ the time to file a complaint to determine the dischargeability of any debt ~~pursuant to~~ under § 523(c) and shall give ~~not~~ no less than 30 ~~days~~ days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be ~~made~~ filed before the time has expired.

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to clarify that the deadline for filing a complaint to determine the dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint to determine the dischargeability of a debt in accordance with this rule.

The substitution of the word "filed" for "made" in the final sentences of subdivisions (c) and (d) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. *See*, e.g., *In re Coggin*, 30 F.3d 1443 (11th Cir. 1994). As amended, these subdivisions require that a motion for an extension of time be *filed* before the time has expired.

The other amendments to this rule are stylistic.

Public Comment on Rule 4007. The proposed amendments to Rules 4004 and 4007 are similar. Five letters were received commenting on the proposed amendments to both of these rules. See "Public Comment on Rule 4004" above.

Gap Report on Rule 4007. No changes since publication, except for stylistic changes in the heading of Rule 4007(d).

Rule 6004. Use, Sale, or Lease of Property

* * * * *

(g) STAY OF ORDER AUTHORIZING USE, SALE, OR LEASE OF PROPERTY. An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (g) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the use, sale, or lease of property under § 363(b) of the Code before the order is implemented. It does not affect the time for filing a notice of appeal in accordance with Rule 8002.

Rule 6004(g) does not apply to orders regarding the use of cash collateral and does not affect the trustee's right to use, sell, or lease property without a court order to the extent permitted under § 363 of the Code.

The court may, in its discretion, order that Rule 6004(g) is not applicable so that the property may be used, sold, or leased immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6004(g) is for a fixed period less than 10 days.

Public Comment on Rule 6004.

(1) George C. Webster II, Esq., of California, wrote in support of this amendment. It will add a 10-day stay to Rules 6004 and 6006 that will have the effect of "leveling the playing field by reducing the prospect of mooting by ambush...."

(2) William E. Shmidheiser, III, Esq., of Virginia, opposes the addition of the 10-day stay to Rules 6004 and 6006. It would represent a fundamental shift in the way business is conducted in bankruptcy cases, slowing down the already slow pace of business and probably killing many otherwise barely-viable deals.

(3) Hon. Poly S. Higdon, Chief Bankruptcy Judge (D. Ore.), wrote that the bankruptcy judges in Oregon oppose the addition of the 10-day stay in Rules 6004 and 6006. This area is often time sensitive. Judge Higdon recognizes that the court could order that the 10-day stay not apply, but notes that the court or the parties may forget to put that in the order. Acknowledging that Rule 7062 is ambiguous with respect to its application to orders in contested matters, Judge Higdon suggests that this problem can be cured simply by amending Rule 7062 and 9014 to delete the application of Rule 7062 in contested matters.

(4) Wade H. Logan, Esq., of South Carolina, opposes the addition of the 10-day stay in Rules 6004 and 6006 to permit an opportunity to appeal. "This issue has not proven a problem in our district... [T]his requirement would simply add to what can often be a very time-consuming process inherent in the Bankruptcy system and is not justified."

(5) Litigation Committee, Bar Association of the District of Columbia, supports the 10-day stay added to Rules 6004 and 6006. These matters "involve a significant effect on the estate and its creditors which should be automatically stayed to provide time to perfect an appeal and obtain a stay pending appeal." Since the court would have discretion to impose or modify the stay, parties should not be prejudiced under the amended rules.

(6) New Jersey Bar Association, Bankruptcy Law Section, suggests that the new 10-day stay in Rules 6004 and 6006 be modified to 3 days. Although they agree with the

concept embodied in these amendments, severe economic or other prejudice could result from a 10-day stay of these types of orders. Competing interests addressed in these proposed amendments can best be served by reducing 10 days to 3 days, which will be "sufficient in the vast majority of cases to afford an aggrieved party the opportunity to apply for a stay pending appeal and will insure that the other parties to the order are not unduly prejudiced."

(7) Prof. Anthony Michael Sabino of St. John's University College of Business Administration, New York, opposes the proposed amendments to Rules 6004 and 6006. These new 10-day stays will be a burden overly harmful to the bankruptcy system.

(8) Arthur L. Rolston, Esq., of California, suggests that the new 10-day stays that will be added to Rules 6004 and 6006 should apply to matters that are actually contested, but not to uncontested matters. If the matter is uncontested, the order should be effective immediately unless the court orders otherwise.

(9) State Bar of California, Federal Courts Committee, opposes all the amendments to Rules 6004 and 6006. There is no justification for shifting the post-order burden. "[A]ll the proposed amendments do is to transfer the burden of requesting post-ruling relief from the losing party to the prevailing party. The California Committee on Federal Courts is of the opinion that such a shift is not wanted, warranted, or desirable."

Gap Report on Rule 6004. No changes since publication.

Rule 6006. Assumption, Rejection ~~and~~ or Assignment of an Executory ~~Contracts and~~ Contract or Unexpired ~~Leases~~ Lease

* * * * *

(d) STAY OF ORDER AUTHORIZING ASSIGNMENT. An order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (d) is added to provide sufficient time for a party to request a stay

pending appeal of an order authorizing the assignment of an executory contract or unexpired lease under § 365(f) of the Code before the assignment is consummated. The stay under subdivision (d) does not affect the time for filing a notice of appeal in accordance with Rule 8002.

The court may, in its discretion, order that Rule 6006(d) is not applicable so that the executory contract or unexpired lease may be assigned immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6006(d) is for a fixed period less than 10 days.

Public Comment on Rule 6004. Nine letters were received containing the same comments on Rules 6004 and 6006 (both rules are amended to add 10-day stays to certain orders). See "Public Comment on Rule 6004" above. In addition, the State Bar of California, Business Law Section, asked why the current Rule 7062, which was amended in 1991 to make the Rule 7062 ten-day stay inapplicable to §365 orders, is being changed now to impose the ten-day stay on such orders. They also suggest that "entry of order" be defined (is the paper docket accurate in relation to the Pacer docket; is the "entered" stamp on the order always the date it is entered on the paper docket?).

Gap Report on Rule 6004. No changes since publication.

Rule 7001. Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. ~~It is a proceeding~~ The following are adversary proceedings:

(1) a proceeding to recover money or property, ~~except~~ other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);

(3) a proceeding to obtain approval ~~pursuant to~~ under § 363(h) for the sale of both the interest of the estate and of a co-owner in property;

(4) a proceeding to object to or revoke a discharge~~,~~;

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan~~,~~;

(6) a proceeding to determine the dischargeability of a debt~~,~~;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination ~~is provided in a chapter 9, 11, 12, or 13 plan,~~;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing~~,~~; or

(10) a proceeding to determine a claim or cause of action removed ~~pursuant to~~ under 28 U.S.C. § 1452.

COMMITTEE NOTE

This rule is amended to recognize that an adversary proceeding is not necessary to obtain injunctive or other equitable relief that is provided for in a plan under circumstances in which substantive law permits the relief. Other amendments are stylistic.

Public Comment on Rule 7001.

(1) State Bar of California, Federal Courts Committee, supports the proposed amendments to Rule 7001.

(2) Wade H. Logan, III, Esq., of South Carolina, wrote that the proposed amendment to Rule 7001(7) is "well advised."

(3) Francis M. Allegra, Deputy Associate Attorney General of the United States,

wrote that the Department of Justice opposes the proposed amendment to Rule 7001 because it "jeopardizes unjustifiably the rights of those subject to injunctive or other equitable relief." The procedural safeguards under Civil Rule 65 would be lost. The targets will have their rights weighed in light of the rights of those affected by the plan; a tacit burden shifting can be expected requiring the targets to show effectively that their opposition to the injunctive relief is meritorious enough to overcome the totality of the interests dealt with by the plan. In addition, plans are frequently contracts of adhesion and injunctions included in lengthy plans may not receive proper scrutiny. The federal government would be an appealing target for a debtor seeking protection from a federal creditor or regulator, with a high risk of inadequate notice to affected agencies. Finally, there are barriers to appealing a confirmation order (such as an expensive supersedeas bond for a stay).

(4) Richard H. Walker, General Counsel, Securities and Exchange Commission, wrote that the staff of the SEC opposes the proposed amendments to Rule 7001 because it would impair procedural rights. Injunctions in plans do not carry safeguards present for injunctive relief in an adversary proceeding. "We have reviewed many plans incorporating injunctions that are not prominently displayed and whose effect is not adequately described in disclosure statements." Also, the plan process does not focus on the rights of any one creditor, but is class oriented, which, together with the absence of certain procedural protections, "would raise serious due process concerns." And including injunctions in a plan shifts the burden from the debtor to the target of the injunction to object to the plan, under a statutory scheme that does not accord the same weight to his interests as the injunctive criteria." Also, appealing a confirmation order is onerous. He also wrote that the SEC has seen attempts to extinguish law enforcement claims against directors, officers and affiliates in plans. And the amendment would place the burden on the creditor to come into court and prove why they should not be enjoined.

(5) Prof. Michael Anthony Sabino of St. John's University College of Business Administration, New York, made several stylistic suggestions.

(6) Bar Association of the District of Columbia, Litigation Committee, wrote that this change would streamline the confirmation process and avoid time consuming ancillary litigation. Although imposition of injunctions without the requisite evidence propounded by the debtor would be highly prejudicial to the affected creditors, injunctive relief is included as plan terms on a routine basis. Therefore, the amendment would be sanctioning current practice in this regard.

Gap Report on Rule 7001. No changes since publication, except for stylistic changes.

Rule 7004. Process, Service of Summons, Complaint

* * * * *

(e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED STATES. ~~If service is made pursuant to Rule 4(c)-(j)~~ Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R.Civ.P. ~~it~~ shall be ~~made~~ by delivery of the summons and complaint within 10 days after the summons is issued ~~following issuance of the summons~~. If service is ~~made~~ by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days after the summons is issued ~~following issuance of the summons~~. If a summons is not timely delivered or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country.

* * * * *

COMMITTEE NOTE

Subdivision (e) is amended so that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country.

Public Comment on Rule 7004.

(1) State Bar of California, Business Law Section, does not oppose the amendment, which "merely seeks to make it clear that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country."

(2) State Bar of California, Federal Courts Committee, supports the proposed amendments to Rule 7004(e).

(3) Bar Association of the District of Columbia, Litigation Committee, supports this amendment as a "practical change."

Gap Report on Rule 7004. No changes since publication.

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings. ~~An order granting relief from an automatic stay provided by § 362, § 922, § 1201, or § 1301 of the Code, an order authorizing or prohibiting the use of cash collateral or the use, sale or lease of property of the estate under § 363, an order authorizing the trustee to obtain credit pursuant to § 364, and an order authorizing the assumption or assignment of an executory contract or unexpired lease pursuant to § 365 shall be additional exceptions to Rule 62(a).~~

COMMITTEE NOTE

The additional exceptions to Rule 62(a) consist of orders that are issued in contested matters. These exceptions are deleted from this rule because of the amendment to Rule 9014 that renders this rule inapplicable in contested matters unless the court orders otherwise. *See also* the amendments to Rules 3020, 3021, 4001, 6004, and 6006 that delay the implementation of certain types of orders for a period of ten days unless the court otherwise directs.

Public Comment on Rule 7062.

(1) George C. Webster II, Esq., of California, wrote in support of the amendments to Rule 7062 and 9014, which will render Civil Rule 62(a) inapplicable in contested matters. The amendments will cure the uncertainty that exists under the current Rules regarding the application of Civil Rule 62(a) in bankruptcy.

(2) Hon. Poly S. Higdon, Chief Bankruptcy Judge (D. Ore.), acknowledged that Rule 7062 is ambiguous with respect to its application to orders in contested matters, and agrees that the problem can be cured by amending Rule 7062 and 9014 to delete the application of Rule 7062 in contested matters. But the bankruptcy judges in Oregon oppose the addition of 10-day stays in Rules 3020, 4001(a)(3), 6004, or 6006.

(3) Bar Association of the District of Columbia, Litigation Committee, commented that the proposed amendments to Rules 7062 and 9014 "are appropriate because most orders entered in contested matters are either interlocutory, ministerial or simply too insignificant to the outcome of the case to require the ten day stay" and "many

of these orders should be immediately effective to avoid additional costs to the estate which accrue during the ten day period..."

(4) State Bar of California, Federal Courts Committee, opposes the amendments to Rules 7062 and 9014 (as well as the 10-day stays added to Rules 3020, 4001(a), 6004, and 6006). While not unmindful of the difficulties encountered in applying Rule 7062, "a better remedy would be to extend the scope of [Rule 7062] beyond 'enforcement.'" They believe that the proposed amendments would cause confusion. "No reason is given for changing current practice which, although not trouble free, is at least known and in most circumstances clear and workable."

(5) State Bar of California, Business Law Section, agrees with the proposed amendment to Rules 7062 and 9014 because "the provisions of Rule 62 are frequently not appropriate for orders granting or denying motions." The letter comments that the proposed amendments to Rules 7062 and 9014 "will clarify what has been a consistent source of confusion."

Gap Report on Rule 7062. No changes since publication.

Rule 9006. Time

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(b) ENLARGEMENT.

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(2) ENLARGEMENT NOT PERMITTED. The court may not enlarge the time for taking action under Rules 1007(d), ~~1017(b)(3),~~ 2003(a) and (d), 7052, 9023, and 9024.

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COMMITTEE NOTE

Rule 9006(b)(2) is amended to conform to the abrogation of Rule 1017(b)(3).

Public Comment on Rule 9006. None.

Gap Report on Rule 9006. The proposed amendment to Rule 9006(b)(2) has been

added as a technical change to conform to the abrogation of Rule 1017(b)(3). The proposed amendment to Rule 9006(c)(2), providing that the time under Rule 1019(6) to file a request for payment of an administrative expense after a case is converted to chapter 7 could not be reduced by the court, was deleted. The proposed amendments to Rule 1019(6) have been changed so that the court will fix the time for filing the request for payment. Since the court will fix the time limit, the court should have the power to reduce it. See Gap Report to Rule 1019(6).

Rule 9014. Contested Matters

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, ~~7062,~~ 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

COMMITTEE NOTE

This rule is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

Rule 7062 provides that Rule 62 F.R.Civ.P., which governs stays of proceedings to enforce a judgment, is applicable in adversary proceedings. The provisions of Rule 62, including the ten-day automatic stay of the enforcement of a judgment provided by Rule 62(a) and the stay as a matter of right by posting a supersedeas bond provided in Rule 62(d), are not appropriate for most orders granting or denying motions governed by Rule 9014.

Although Rule 7062 will not apply automatically in contested matters, the amended rule permits the court, in its discretion, to order that Rule 7062 apply in a particular matter, and Rule 8005 gives the court discretion to issue a stay or any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. In addition, amendments to Rules 3020, 4001, 6004, and 6006 automatically stay certain types of orders for a period of ten days, unless the court orders otherwise.

Public Comment on Rule 9014. Five letters were received commenting on the proposed amendments to Rules 7062 and 9014, which would render Civil Rule 62 inapplicable in contested matters. See "Public Comment on Rule 7062" above.

Gap Report on Rule 9014. No changes since publication.

B. The "Litigation Package" - Proposed Amendments to Bankruptcy Rules 1006, 1007, 1014, 1017, 2001, 2004, 2007, 2014, 2016, 3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001, 6004, 6006, 6007, 9006, 9013, 9014, 9017, 9021, and 9034 Submitted for Approval to Publish for Comment.

1. *Introduction to Proposed Amendments.*

The Advisory Committee prepared the following introduction to the proposed amendments relating to litigation in bankruptcy cases, and requests that this introduction be published together with the preliminary draft of proposed amendments.

Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice

At the request of the Advisory Committee on Bankruptcy Rules, in 1995 the Federal Judicial Center conducted an extensive survey of bankruptcy judges, lawyers, trustees, clerks and other participants in the bankruptcy system to determine their satisfaction or dissatisfaction with the Federal Rules of Bankruptcy Procedure. The Advisory Committee requested the survey in connection with the work of its Long-Range Planning Subcommittee and for the purpose of identifying areas that are in need of improvement. The survey results indicated general satisfaction with the Rules, but identified motion practice and litigation as areas of significant dissatisfaction.

Part VII of the Rules govern adversary proceedings, which is a form of litigation in bankruptcy court conducted in a manner that is similar to a civil action in district court. For example, an adversary proceeding is commenced by filing a complaint followed by service of a summons. Most Part VII Rules incorporate by reference specific Federal Rules of Civil Procedure. The Advisory Committee believes, and the Federal Judicial Center survey confirms, that the Rules governing adversary proceedings are working well.

But most requests for court orders and litigated disputes in bankruptcy court are not adversary proceedings; they are governed by some form of motion practice unrelated to any adversary proceeding. There has been some confusion and criticism regarding procedures that govern these matters, and these are the troublesome areas identified in the results of the Federal Judicial Center survey.

One significant difference between a typical motion filed in a civil action in the district court and a typical motion filed in bankruptcy court is that the motion in district court relates to a pending lawsuit. For example, a defendant may file a motion to dismiss a complaint or for summary judgment. In contrast, a motion filed in bankruptcy court usually commences new litigation that is unrelated to any pending lawsuit. For example, a creditor may file a motion for the appointment of a trustee in a chapter 11 case or for relief from the automatic stay, or a trustee may file a motion to assume or reject an executory contract. Each of these motions commences litigation by or against specified parties who may not be parties in any pending litigation. Although these motions are made within a bankruptcy case, the bankruptcy case is not, in and of itself, litigation involving a legal dispute in the traditional sense. Under section 301 of the Bankruptcy Code, the mere filing of a voluntary bankruptcy petition constitutes an order for relief.

A serious criticism of the Bankruptcy Rules is that there is a lack of national uniformity and insufficient guidance regarding procedures governing the resolution of these important substantive disputes. Motions relating to a pending adversary proceeding -- such as a motion relating to discovery in an adversary proceeding seeking to recover a preferential payment to a creditor -- may be subject to minor local variation consistent with the flexibility present in district court motion practice. The local variations in procedure addressed by these proposed amendments are of much greater consequence.

Although such motions that are unrelated to pending litigation may involve millions of dollars to the litigants, the current Rules provide little specificity or uniformity as to the procedure governing them. Current Rule 9014 provides that relief is obtained by motion served in the manner provided for service of a summons, that reasonable notice and opportunity to be heard must be afforded, and that a response is not required unless the court orders otherwise. In the absence of a contrary order, certain listed Part VII rules applicable to adversary proceedings -- most relating to discovery or summary judgment -- apply to the motion, and the court may order that other Part VII rules shall apply. Rule 9006(d), which applies to motions generally, provides that, unless the court orders otherwise, at least five days' notice of a hearing must be given and, if the motion is supported by affidavit, the affidavit must be served at least one day before the hearing. These general provisions are often varied or supplemented with greater detail by local rule or court order. The result is that practice varies from district to district or from court to court. The Advisory Committee believes that greater specificity and national uniformity, as well as improvements to the current procedures, are desirable for such motions that are unrelated to any pending litigation.

Another criticism addressed by the Advisory Committee is confusion resulting from terminology used in the Bankruptcy Rules. For example, Rule 9014 governs "contested matters," such as a motion to reject an executory contract or a motion to obtain court approval of a sale of assets. In many instances, "contested matters" are, in fact, uncontested. Other proceedings, such as an "application" for approval of professional fees, are not "contested matters" under the Rules, despite the fact that they are often contested by parties in interest.

The Advisory Committee has spent more than two years studying the Rules relating to litigation in bankruptcy courts and formulating proposed amendments designed to improve procedures for obtaining court orders and resolving disputes. As mentioned above, the Advisory Committee is satisfied that the rules governing adversary proceedings under Part VII are working well. But the Advisory Committee is proposing amendments that would substantially revise other procedures for obtaining court orders unrelated to pending litigation, both for routine administrative matters and for more

complex disputes that require greater procedural safeguards.

The most important and fundamental changes would be made to Rules 9013 (Motions; Form and Service) and 9014 (Contested Matters), although 25 other Rules will have to be revised to conform to the new procedures. In general, the proposed amendments would increase national uniformity and provide more detailed procedural guidance when a party requests relief unrelated to pending litigation; these amendments should reduce substantially the number of local rules.

The highlights of the preliminary draft of the proposed amendments are as follows:

(1) Rule 9013 would be replaced with a new rule on "applications." This rule would govern specific types of relief in areas that are routine, nonsubstantive, and rarely contested. For example, Rule 9013 would govern the procedure for obtaining a court order to jointly administer two or more cases, or for an order reopening a closed case. The procedures would be streamlined so as to avoid unnecessary costs or delay.

* The application and a proposed order would be served on specified entities at any time before, or even at, the time when the application is filed with the court; advance notice is not required.

* Although service by first class mail is available, the court by local rule may permit the application and accompanying papers to be served by electronic means.

* A response to the application would not be required and the court may order relief without a hearing.

(2) Rule 9014 would govern motions that are related to the administration of the bankruptcy case or the estate, but are usually unrelated to any other pending litigation. These motions are often contested and may affect significant substantive rights of the parties. For example, a motion asking the court to order the appointment of a trustee in a chapter 11 case, requesting relief from the automatic stay, requesting authorization for a debtor in possession to obtain credit, or seeking an order terminating the exclusive period in which only the debtor may file a plan of reorganization, would be an administrative proceeding governed by Rule 9014. Certain types of proceedings, such as a chapter 11 confirmation hearing governed by Rule 3020, would be expressly excluded from the scope of the rule so

that more appropriate tailor-made procedures could govern. The title of Rule 9014 would be changed from "Contested Matters" to "Administrative Proceedings."

The significant features of an administrative proceeding under the preliminary draft of the proposed amendments to Rule 9014 include the following:

* The proceeding would be commenced by filing and serving a motion.

* The rule would specify the papers that must accompany the motion. A proposed order and, unless the movant is a consumer debtor, one or more supporting affidavits must be included. In certain situations, a copy of a valuation report must be included with the motion papers.

* The motion papers, including notice of the hearing, must be served on specified entities at least 20 days before the hearing date. The court by local rule may permit the papers to be served by electronic means.

* Interim relief, if appropriate, may be ordered on an expedited basis.

* A response to the motion may be served and filed, but no later than five days before the scheduled hearing date. If no timely response is filed, the court may rule on the matter without a hearing or may give notice to the movant that a hearing will be held notwithstanding the absence of a response.

* Discovery methods applicable in adversary proceedings would be available, except that mandatory disclosures required under Civil Rule 26(a)(1)-(3) and the discovery meeting required under Rule 26(f) would not apply. Certain 30-day time periods in the Civil Rules relating to discovery would be reduced to ten days consistent with the expedited nature of administrative proceedings.

* If a timely response is filed, the court would hold a hearing to determine whether there is a genuine issue as to any material fact and, if not, whether any party is entitled to relief as a matter of law.

Except for certain types of motions or if the parties otherwise consent, no testimony would be taken at the hearing. Therefore, attorneys and unrepresented parties would not have to bring witnesses to the hearing in most situations. If there is no genuine issue as to any material fact, the court may grant the appropriate relief. If the court finds that there is a genuine issue of material fact, the court would conduct a status conference for the purpose of expediting the disposition of the proceeding and scheduling the evidentiary hearing. Alternatively, on reasonable notice to the parties, the court may order that an evidentiary hearing at which witnesses may testify will be held on the originally scheduled hearing date.

* Rule 43(e) of the Federal Rules of Civil Procedure provides that where a motion is based on facts not appearing of record the court may hear the motion on affidavits presented by the parties. The Advisory Committee believes, however, that the assessment of witness credibility is as important at an evidentiary hearing on an administrative motion as it is at a trial in an adversary proceeding. Accordingly, the proposed amendments to Rule 9014 provide that Civil Rule 43(e) does not apply at an evidentiary hearing on an administrative motion. When there is a genuine issue of material fact, this provision would require that witnesses appear and testify, rather than give testimony by affidavit.

* To provide flexibility where needed, the court for cause may order that any procedural requirement under Rule 9014 will not apply or will be amended in a particular proceeding. But the requirements of Rule 9014 may not be abrogated by local rule or general order. In accordance with Rule 9006, the court also may extend or reduce any time period set forth in Rule 9014.

It would be desirable to divide all proceedings arising in, or related to, a bankruptcy case into only three categories: applications under Rule 9013, administrative proceedings under Rule 9014, and adversary proceedings under Part VII. But there are some proceedings that do not fit well into any of these three categories. These excluded proceedings, which are listed in the proposed amendments to Rule 9014(a), would be governed by other specified rules.

Although the proposed amendments to Rules 9013 and 9014 would provide greater

guidance and national uniformity, they would not govern motions that are made within a pending adversary proceeding, pending administrative proceeding, or other pending litigation. For example, Rules 9013 and 9014 would not govern a motion dealing with a discovery dispute in an adversary proceeding. Motions that are related to pending litigation in bankruptcy court -- which are similar to typical motions made in a civil action in the district court -- would continue to be guided by other national rules, such as Rule 7007 or 9006, and by local rules and practice.

This preliminary draft of these proposed amendments has not been approved except for the limited purpose of publication for comment. The Advisory Committee is seeking comments and suggestions from the bench and bar regarding all aspects of these proposed amendments, and is especially interested in receiving comments regarding the highlighted provisions mentioned above. All comments, whether favorable, adverse, or otherwise, will be considered by the Advisory Committee, and further revisions to the preliminary draft may be made before the Advisory Committee finally recommends the adoption of amendments to the Bankruptcy Rules relating to litigation and motion practice.

2. *Rule-by-Rule Synopsis of Proposed Amendments ("Litigation Package"):*

Each of the following rules has been amended for stylistic improvement, as well as for substantive changes as described below.

(a) Rule 1006 is amended to provide that a request to pay the filing fee in installments may be granted without notice or a hearing. The procedural requirements for an application under Rule 9013 or for an administrative motion under Rule 9014 are not applicable. Other amendments are for clarification regarding the prohibition on paying fees to an attorney or bankruptcy petition preparer before the filing fee has been paid in full.

(b) Rule 1007(c) is amended to provide that a request for an extension of time to file schedules and statements may be resolved without notice or a hearing. The procedural requirements for an application under Rule 9013 or for an administrative motion under Rule 9014 are not applicable.

(c) Rule 1014 is amended to conform to the proposed amendments to Rule 9014.

(d) Rule 1017 is amended to provide that a motion to dismiss a chapter 7 case under § 707(b) is governed by Rule 9014 when initiated by the United States trustee, but is not governed by Rule 9014 when initiated on the court's own motion. The amendments also clarify which entities receive notice of a motion to dismiss under § 707(b).

(e) Rule 2001(a) is amended to conform to the proposed amendments to Rule 9014 and to clarify that a motion for an interim trustee in an involuntary case is governed by Rule 9014.

(f) Rule 2004 is amended to provide that a request for an order to examine an entity under the rule is made by application under Rule 9013. The amendments also clarify that the examination may be held outside the district in which the case is pending if the subpoena is issued by the court

for the district in which the examination is to be held. An attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice either in that court or in the court in which the bankruptcy case is pending.

(g) Rule 2007 is amended to conform to the proposed amendments to Rule 9014.

(h) Rule 2014 has been substantially revised to provide more detailed procedures for obtaining an order authorizing the employment of professionals. A request for court authorization under this Rule is by motion, but is not governed by Rule 9013 or Rule 9014. The amendments provide new notice and service requirements, provide for interim approval of the employment of professionals, and specify requirements for initial disclosures and for supplemental disclosures.

(i) Rule 2016 is amended to provide that a request for compensation for services rendered and for reimbursement of expenses is made by motion governed by Rule 9014, rather than by application. The rule is amended to conform to the proposed amendments to Rule 9014.

(j) Rule 3001(e) is amended to provide that an objection or motion under that rule relating to a transfer of a claim is governed by Rule 9014, and to conform to the proposed amendments to Rule 9014.

(k) Rule 3006 is amended to conform to the proposed amendments to Rule 9014.

(l) Rule 3007 is amended to provide that, unless it is joined with a demand for relief that requires commencement of an adversary proceeding, an objection to the allowance of a claim is made by motion governed by Rule 9014. The rule also provides that the motion must be served at least 30 days before the hearing despite the notice provisions contained in Rule 9014(c).

(m) Rule 3012 is amended to conform to the proposed amendments to Rule 9014.

(n) Rule 3013 is amended to provide that a motion to determine classification of claims and interests is governed by Rule 9014.

(o) Rule 3015(f) is amended to provide more detailed procedures governing an objection to confirmation of a chapter 12 or chapter 13 plan, which is not governed by Rule 9014. Rule 3015(g) is amended to provide that a request to modify a chapter 12 or chapter 13 plan after confirmation is a motion governed by Rule 9014.

(p) Rule 3019 is amended to conform to the proposed amendments to Rule 9014.

(q) Rule 3020(b) is amended to provide more detailed procedures governing an objection to confirmation of a chapter 9 or chapter 11 plan, which is not governed by Rule 9014.

(r) Rule 4001 is amended to conform to the proposed amendments to Rule 9014.

(s) Rule 6004 is amended to conform to the proposed amendments to Rule 9014. If a timely objection if filed after the trustee sends to creditors a notice of a proposed use, sale, or lease of property under § 363(b), the notice is treated as a motion governed by Rule 9014 and the objection is treated as a response. But if the trustee is seeking to sell property free and clear of liens and other interests under § 363(f), the trustee must file a motion governed by Rule 9014 and any party who wants to object must file a response to the motion in accordance with Rule 9014.

(t) Rule 6006 is amended to conform to the proposed amendments to Rule 9014.

(u) Rule 6007 is amended to provide that an objection to a proposed abandonment or disposition of property is governed by Rule 9014. The objection is made by filing and serving a motion in accordance with Rule 9014 before the time to object expires.

(v) Rule 9006(d) is amended to limit it to

motions made within adversary proceedings under Part VII of the rules, and to procedural or dispositive motions relating to pending administrative proceedings under Rule 9014.

(w) Rule 9013 is completely revised to govern a category of proceedings, called "applications," that relate to certain enumerated matters which, in most instances, are nonsubstantive and noncontroversial. The provisions of Rule 9013 will enable parties to obtain certain types of relief in a much shorter time period and with less expense when compared to the procedural requirements for administrative motions under the proposed amendments to Rule 9014. See "*Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice*," above, for a more detailed discussion of the proposed amendments to Rule 9013.

(x) Rule 9014 is completely revised, and the title has been changed from "Contested Matters" to "Administrative Proceedings." The amendments provide uniform and detailed procedures for motions that relate to the administration of the bankruptcy case or the estate, such as a motion seeking the appointment of a chapter 11 trustee, a motion to reject an executory contract, or a motion for authorization to obtain credit. These motions are usually unrelated to any other pending litigation. For a more detailed discussion of the proposed amendments to Rule 9014, see "*Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice*," above.

(y) Rule 9017 is amended to conform to the proposed amendments to Rule 9014, which provides that Rule 43(e) F.R.Civ.P. does not apply at an evidentiary hearing under Rule 9014. The effect of this amendment is that a witness must testify in open court, rather than by affidavit, at an evidentiary hearing in an administrative proceeding.

(z) Rule 9021 is amended to conform to the

proposed amendments to Rule 9014.

(aa) Rule 9034 is amended to add several types of proceedings in which the United States trustee is entitled to receive copies of pleadings and other papers. These amendments are necessary because provisions requiring transmission of such papers to the United States trustee have been deleted from the text of several rules. The amendments also will require that papers relating to the election of a chapter 11 trustee be transmitted to the United States trustee.

3. *Text of Proposed Amendments ("Litigation Package"):*

Rule 1006. Filing Fee

(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the filing fee except as provided in ~~subdivision (b) of this rule~~ Rule 1006(b) or (c). For ~~the purpose~~ purposes of this rule, "filing fee" means the ~~filing~~ fee prescribed by 28 U.S.C. § 1930(a)(1)-(a)(5) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk ~~upon the commencement of a case under the Code~~ when the case is commenced.

(b) PAYING ~~PAYMENT OF FILING FEE~~ IN INSTALLMENTS.

(1) *Request ~~Application~~ for Permission to Pay ~~Filing Fee~~ in Installments.* The clerk shall accept for filing an individual's voluntary petition if it is ~~A voluntary petition by an individual shall be accepted for filing if~~ accompanied by the debtor's signed ~~application~~ request stating that the debtor is unable to pay the filing fee except in installments. The ~~application~~ request shall state the proposed terms of the installment payments and that the ~~applicant~~ debtor has neither paid any money nor transferred any

property to an attorney for services in connection with the case.

(2) *Action on ~~Application~~ the Request.* Before ~~Prior to~~ the meeting of creditors, with or without notice or a hearing, the court may order the filing fee paid to the clerk or grant leave to pay it in installments and fix the number, amount, and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable ~~not~~ no later than 120 days after ~~filing~~ the petition is filed. For cause ~~shown~~, the court may extend the time of any installment to a time that is~~, provided the last installment is paid not~~ no later than 180 days after ~~filing~~ the petition is filed.

(3) ~~*Postponement*~~ *Postponing Payment of ~~Attorney's~~ Other Fees.* After a petition is filed, ~~The~~ the filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney, bankruptcy petition preparer, or any other person who renders services to the debtor in connection with the case.

COMMITTEE NOTE

This rule is amended to provide that a request to pay the filing fee in installments may be granted by the court without notice or a hearing. The procedural requirements for an application under Rule 9013 or an administrative motion under Rule 9014 are not applicable to these requests.

Under subdivision (b)(1), the debtor is required to state in the request for permission to pay the filing fee in installments that the debtor has neither paid money nor transferred property to an attorney for services rendered in connection with the case. A similar statement is not required with respect to bankruptcy petition preparers. A debtor who pays a bankruptcy petition preparer should not be disqualified from paying the filing fee in installments. But after the petition is filed, the debtor is prohibited by Rule 1006(b)(3) from paying fees to an attorney, bankruptcy petition preparer, or any other person for services in connection with the case until the filing fee, including every installment, is paid in full.

Rule 1007. Lists, Schedules and Statements; Time Limits

* * * * *

(c) TIME LIMITS. Except as provided in Rule 1007(d), (e) and (h), in a voluntary case, the debtor shall file the ~~The~~ schedules and statements, other than the statement of intention, ~~shall be filed~~ with the petition ~~in a voluntary case,~~ or, if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days after the petition is filed~~, within 15 days thereafter, except as otherwise provided in~~

~~subdivisions (d), (e), and (h) of this rule~~. In an involuntary case, the debtor shall file the schedules and statements, other than the statement of intention, ~~shall be filed by the debtor~~ within 15 days after ~~entry of~~ the order for relief is entered. Unless the court directs otherwise, schedules ~~Schedules~~ and statements filed ~~prior to~~ before a case is converted ~~the conversion of a case~~ to another chapter ~~shall be~~ are deemed filed in the converted case ~~unless the court directs otherwise.~~ ~~Any~~ A request to extend the ~~for an extension of~~ time for ~~the~~ filing ~~of~~ the schedules and statements may be granted with or without notice or a hearing ~~only on motion for cause shown and on notice to the United States trustee and to any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct~~. Notice of an extension of time shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

COMMITTEE NOTE

This rule is amended to provide that a request for an extension of time to file schedules and

statements under subdivision (c) may be resolved by the court without notice or a hearing. The procedural requirements for an application under Rule 9013 or an administrative motion under Rule 9014 are not applicable to the request. The other amendments are stylistic.

Rule 1014. Dismissal and Change of Venue

(a) DISMISSAL AND TRANSFER OF CASES.

(1) *Cases Filed in Proper District*. If a petition is filed in a proper district and a party in interest makes a~~, on~~ timely motion~~, of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be transferred~~ the court may transfer the case to any other district if ~~the court~~ it determines that the transfer is in the interest of justice or for the convenience of the parties.

(2) *Cases Filed in Improper District*. If a petition is filed in an improper district and a party in interest makes a~~, on~~ timely motion~~, of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities~~

~~as directed by the court, the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties~~ the court may dismiss the case or, if it determines that transfer is in the interest of justice or for the convenience of the parties, transfer the case to another district.

(b) ~~PROCEDURE WHEN~~ PETITIONS INVOLVING THE SAME DEBTOR OR RELATED DEBTORS ~~ARE~~ FILED IN DIFFERENT DISTRICTS ~~COURTS~~. If petitions ~~commencing cases under the Code~~ are filed in different districts by or against (1) the same debtor, ~~or~~ (2) a partnership and one or more of its general partners, ~~or~~ (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending ~~and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court~~, the court ~~may~~ shall determine, in the interest of justice or for the convenience of the parties, the district or districts in which the ~~case or~~ cases should proceed. ~~Except as~~

~~otherwise ordered by the court in the district in which the petition filed first is pending, the proceedings on the other petitions shall be stayed by the courts in which they have been filed until the determination is made.~~ Until that determination is made, any other court where another petition is pending shall stay its proceedings unless the court in which the motion is pending orders otherwise.

(c) PROCEDURE GOVERNING MOTION. Rule 9014 governs a motion made under this rule. Every entity filing a petition against the debtor under § 303 of the Code shall be treated as an entity listed in Rule 9014(c)(1).

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rules 9014 and 9034. The list of entities entitled to notice of a hearing on transfer or dismissal of a case under this rule is deleted as unnecessary because Rule 9014, which governs a motion under this rule, sets forth the list of entities entitled to service of the motion papers. Reference to the United States trustee is unnecessary because Rule 9034 includes the transfer or dismissal of a case in the list of matters with respect to which the United States trustee is entitled to receive papers.

Rule 1017. Dismissal or Conversion of Case; Suspension

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~~(c) DISMISSAL OF VOLUNTARY CHAPTER 7 OR CHAPTER 13 CASE FOR FAILURE TO TIMELY FILE LIST OF CREDITORS, SCHEDULES, AND STATEMENT OF FINANCIAL AFFAIRS. The court may dismiss a voluntary chapter 7 or chapter 13 case under § 707(a)(3) or § 1307(c)(9) after a hearing on notice served by the United States trustee on the debtor, the trustee, and any other entities as the court directs.~~

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(e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. The court may dismiss an individual debtor's case for substantial abuse under § 707(b) only on motion by the United States trustee or on the court's own motion ~~and after a hearing on notice to the debtor, the trustee, the United States trustee, and such any other entities as the court directs~~.

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, before the time has expired, the court for cause extends the time for filing the motion. The United

States trustee shall set forth in the motion all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is set on the court's own motion, notice of the hearing shall be served on the debtor, the debtor's attorney, and the trustee no later than 60 days after the first date set for the meeting of creditors under § 341(a). The notice shall set forth all matters to be considered by the court at the hearing. The clerk shall transmit a copy of the notice to the United States trustee.

(f) PROCEDURE FOR DISMISSAL, CONVERSION, OR SUSPENSION.

(1) Rule 9014 governs a proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§706(a), 1112(a), 1208(a) or (b), ~~or~~ 1307(a) or (b), or Rule 1017(e)(2).

(2) Conversion or dismissal under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on ~~motion~~ application filed and served as required by Rule 9013.

(3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§ 1208(a) or 1307(a). The filing date of the notice becomes the date of the conversion order for the purposes of applying § 348(c) and Rule 1019. The clerk shall promptly transmit a copy of the notice to the United States trustee.

COMMITTEE NOTE

Subdivision (e) is amended to delete the list of the entities entitled to service of the motion except when the motion is on the court's own initiative. When the United States trustee files the motion for dismissal under § 707(b), the list of the entities to be served is in Rule 9014(c)(1).

Subdivision (f) is amended to provided that a proceeding to dismiss a case under § 707(b) is not governed by Rule 9014 if it is initiated on the court's own motion.

Rule 2001. Appointment of Interim Trustee Before Order for Relief in a Chapter 7 Liquidation Case

(a) APPOINTMENT. At any time after ~~following the commencement of~~ an involuntary ~~liquidation~~ case is commenced under chapter 7 and before an order for relief, the court on ~~written~~ motion of a party in interest may order the appointment of an interim

trustee under § 303(g) of the Code. ~~The motion shall set forth the necessity for the appointment and may be granted only after hearing on notice to the debtor, the petitioning creditors, the United States trustee, and other parties in interest as the court may designate.~~ Rule 9014 governs the motion. Every entity filing a petition against the debtor under § 303 shall be treated as an entity listed in Rule 9014(c)(1).

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COMMITTEE NOTE

This rule is amended to provide that a motion for the appointment of an interim trustee is governed by Rule 9014. The petitioners, as well as the entities listed in Rule 9014(c)(1), are entitled to be served with the motion papers. Reference to the United States trustee is unnecessary because Rule 9034 includes the appointment of an interim trustee on the list of matters as to which the United States trustee is entitled to receive papers.

Rule 2004. Examination

(a) EXAMINATION ON ~~MOTION~~ APPLICATION. On ~~motion~~ application of any party in interest, the court may order the examination of any entity. Rule 9013 governs the application.

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(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS ~~DOCUMENTARY EVIDENCE~~. The attendance of an

entity for examination and for the production of ~~documentary evidence~~ documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled ~~in the manner~~ as provided in Rule 9016 for the attendance of a witness ~~witnesses~~ at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is authorized to practice in that court or in the court in which the case is pending.

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COMMITTEE NOTE

Subdivision (a) is amended to conform to the amendments to Rule 9013, which governs an application for an order under this rule.

Subdivision (c) is amended to clarify that an examination ordered pursuant to Rule 2004(a) may be held outside the district in which the case is pending if the subpoena is issued by the court for the district in which the examination is to be held and is served in the manner provided in Rule 45 F.R.Civ.P., made applicable by Rule 9016.

The subdivision is amended further to clarify that, in addition to the procedures for the issuance of a subpoena set forth in Rule 45 F.R.Civ.P., an attorney may issue and sign a subpoena on behalf of the court for the district in which a Rule 2004 examination is to be held if the attorney is authorized to practice either in the court in which the case is pending or in the court for the district in which the examination is

to be held. This provision supplements the procedures for the issuance of a subpoena set forth in Rule 45(a)(3)(A) and (B) F.R.Civ.P. and is consistent with one of the purposes of the 1991 amendments to Rule 45, to ease the burdens of interdistrict law practice.

Rule 2007. Review of Appointment of Creditors' Committee Organized Before Commencement of ~~the~~ a Chapter 9 or Chapter 11 Case

(a) MOTION TO REVIEW APPOINTMENT. If a committee appointed by the United States trustee ~~pursuant to~~ under § 1102(a) of the Code consists of the members of a committee organized by creditors before ~~the commencement of~~ a chapter 9 or chapter 11 case was commenced, on motion of a party in interest ~~and after a hearing on notice to the United States trustee and other entities as the court may direct~~, the court may determine whether the appointment ~~of the committee~~ satisfies the requirements of § 1102(b)(1) ~~of the Code~~. Rule 9014 governs the motion. If the court finds that the appointment failed to satisfy the requirements of § 1102(b)(1), the court shall direct the United States trustee to vacate the appointment of the committee and may order other appropriate relief.

(b) SELECTION OF COMMITTEE MEMBERS ~~OF COMMITTEE~~. The court may find that a committee organized by unsecured creditors before the commencement of a chapter 9 or

chapter 11 case was fairly chosen if:

(1) it was selected by a majority in number and amount of claims of unsecured creditors who may vote under § 702(a) ~~of the Code~~ and who attended ~~were present~~ in person or were represented at a meeting for ~~of~~ which all creditors having unsecured claims of over $1,000, or the 100 unsecured creditors having the largest claims, had been given at least five ~~days~~ days' notice in writing, and ~~of~~ at which ~~meeting~~ written minutes reporting the names of the creditor witnesses present or represented and voting and the amounts of their claims were kept and are available for inspection;

(2) all proxies voted at the meeting for the elected committee were solicited ~~pursuant to~~ in accordance with Rule 2006 and the lists and statements required by Rule 2006(e) ~~subdivision (e) thereof~~ have been transmitted to the United States trustee; and

(3) the organization of the committee was in all other respects fair and proper.

~~(c) FAILURE TO COMPLY WITH REQUIREMENTS FOR APPOINTMENT. After a hearing on notice pursuant to subdivision (a) of this rule, the court shall direct the United States trustee to vacate the appointment of the committee and may order other appropriate action if the court finds that such appointment failed to satisfy the requirements of § 1102(b)(1) of the Code.~~

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014 and to make stylistic improvements.

Rule 2014. Employment of Professional ~~Persons~~ Person

(a) MOTION FOR AN ORDER AUTHORIZING EMPLOYMENT. A request for an order authorizing employment under § 327, § 1103, or § 1114 of the Code may be made only by written motion of the trustee or committee. The motion shall:

(1) state specific facts showing why the employment is necessary;

(2) state the name of the person to be employed and the reasons for the selection;

(3) state the professional services to be rendered;

(4) disclose any proposed arrangement for

compensation;

(5) state that, to the best of the movant's knowledge, the person to be employed is eligible under the Bankruptcy Code for employment for the purposes set forth in the motion; and

(6) disclose any interest that the person to be employed holds or represents that is adverse to the estate.

(b) STATEMENT OF PROFESSIONAL. The motion shall be accompanied by a verified statement of the person to be employed. The statement shall:

(1) state that the person is eligible under the Bankruptcy Code for employment for the purposes set forth in the motion;

(2) disclose any interest that the person holds or represents that is adverse to the estate;

(3) disclose the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee;

(4) if the professional is an attorney, state the information required to be disclosed under § 329(a); and

(5) state whether the person shared or has agreed to share any compensation with any person and, if so, the particulars of any sharing or agreement to share other than the details of any agreement for the sharing of compensation with a partner, employee, or regular associate of the partnership, corporation, or person to be employed.

(c) SERVICE. The motion and at least 10 days' notice of the hearing shall be transmitted to the United States trustee, unless the case is a chapter 9 case, and shall be served on:

(1) the trustee;

(2) any committee elected under § 705 or appointed under § 1102 of the Code, or the committee's authorized agent;

(3) the creditors included on the list filed under Rule 1007(d); and

(4) any other entity as the court may direct.

(d) HEARING. The court may resolve the motion

without a hearing if no objection or request for a hearing is filed at least 2 days before the scheduled hearing date.

(e) INTERIM EMPLOYMENT ORDER. If the motion so requests, the court may authorize employment on an interim basis without notice and a hearing pending resolution of the motion. A copy of the order authorizing employment on an interim basis, the motion, and at least 5 days' notice of the hearing shall be served forthwith on the entities listed in Rule 2014(c). The hearing shall be scheduled for a time that is not more than 14 days after service of the order authorizing interim employment, unless the court orders otherwise.

(f) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF EMPLOYED PROFESSIONAL. If, under the Code and this rule, a court authorizes the employment of an individual, partnership, or corporation, any partner, member, or regular associate of the individual, partnership, or corporation may act as the person so employed, without further order of the court. If a partnership is employed, a further order authorizing employment is not required solely because the partnership has dissolved due to the addition or

withdrawal of a partner.

(g) SUPPLEMENTAL STATEMENT OF PROFESSIONAL. Within 15 days after becoming aware of any matter that is required to be disclosed under Rule 2014(b), but that has not yet been disclosed, a person employed under this rule shall file a supplemental verified statement, serve copies on the entities listed in Rule 2014(c) and, unless the case is a chapter 9 municipality case, transmit a copy to the United States trustee.

~~(a) APPLICATION FOR AN ORDER OF EMPLOYMENT. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors,~~

~~any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.~~

~~(b) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF ATTORNEYS OR ACCOUNTANTS. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.~~

COMMITTEE NOTE

This rule is amended to improve the procedures for obtaining an order authorizing the employment of

professionals. The trustee -- which is defined in Rule 9001(10) to include a debtor in possession in a chapter 11 case -- or a committee seeking authorization is required to file a motion, rather than an application, and copies of the motion must be served on the parties in interest specified in the rule. If the motion requests, the court may authorize employment on an interim basis without a hearing so as to avoid delays in obtaining professional assistance immediately.

The moving party is required to state that, to the best of the person's knowledge, the professional to be employed is eligible to serve. The rule also requires that the professional state in a verified statement that the professional is eligible to serve. Eligibility is governed by the Bankruptcy Code and may depend on the purposes for which the professional is to be employed. For example, an attorney may be employed to represent the trustee or debtor in possession under § 327(a) only if the person is disinterested. See 11 U.S.C. § 101 for the definition of "disinterested." If an attorney is retained solely as special counsel under § 327(e), the professional need not be disinterested so long as other requirements are met. Nonetheless, regardless of the purpose for which the professional is to be employed, the moving party must disclose any interest that the person to be employed holds or represents that is adverse to the estate. The amendments to this rule also add to the matters that must be disclosed any arrangements for sharing compensation.

Subdivision (f) is expanded to cover firms when the professional is not an attorney or accountant, and is amended to clarify that, if a partnership is employed, a further order authorizing employment is not required solely because the partnership has dissolved due to the addition or withdrawal of a partner.

Subdivision (g) is added to require timely supplemental disclosure of a matter required to be disclosed, whether or not the matter to be disclosed relates to an event occurring subsequent to a statement previously filed under this rule.

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses

~~(a) APPLICATION FOR COMPENSATION OR REIMBURSEMENT. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement~~

~~or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.~~

(a) MOTION FOR COMPENSATION OR REIMBURSEMENT. Rule 9014 governs a motion for interim or final payment from the estate for compensation for services rendered or the reimbursement of expenses.

(1) The motion shall state the amount requested, the services rendered, the time expended, and the expenses incurred. If compensation is requested, the motion shall also state:

(A) the source and the amount of any payments that have been made or promised for services rendered or to be rendered in any capacity in

connection with the case;

(B) whether any compensation previously received has been shared and whether an agreement or understanding exists between the movant and any other entity to share compensation received or to be received for services rendered in or in connection with the case; and

(C) the particulars of any sharing of compensation or any agreement or understanding with respect to sharing compensation, but the details of any agreement by the movant to share compensation as a member or regular associate of a firm of lawyers or accountants is not required.

(2) This Rule 2016(a) applies to a motion for compensation for services rendered by an attorney or accountant even if the motion is filed by a creditor or other entity.

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COMMITTEE NOTE

This rule is amended to provide that a proceeding for compensation or reimbursement of

expenses from the estate is governed by Rule 9014. The provision requiring transmittal of papers to the United States trustee is deleted as unnecessary. See Rule 9034. The other amendments are stylistic.

Rule 3001. Proof of Claim

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(e) TRANSFERRED CLAIM.

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~~(5) *Service of Objection or Motion; Notice of Hearing.* A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.~~

(5) *Procedures.* An objection under Rule 3001(e)(2) or (4), or a motion under Rule 3001(e)(3) or (4), is governed by Rule 9014. The transferor or transferee, whichever is appropriate, shall be treated as an entity listed in Rule 9014(c)(1).

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COMMITTEE NOTE

Paragraph (e)(5) is amended to provide that an objection or motion under Rule 3001(e) is governed by Rule 9014. An objection is made by filing a motion in accordance with Rule 9014. Since the objection or motion is governed by Rule 9014, service must be made 20 days before the hearing date, rather than 30 days as is provided under the current Rule 3001(e)(5).

The other amendments are stylistic.

Rule 3006. Withdrawal of Claim; Effect on Acceptance or Rejection of Plan

(a) WITHDRAWAL OF CLAIM. Except as provided in this rule, a ~~A~~ creditor may withdraw a claim as of right by filing a notice of withdrawal~~, except as provided in this rule~~. Unless the court orders otherwise, a creditor may not withdraw a claim if, after the creditor files a proof of claim, ~~If after a creditor has filed a proof of claim~~ an objection to the claim is filed, ~~thereto~~ ~~or~~ a complaint is filed against ~~that~~ the creditor in an adversary proceeding, ~~or~~ the creditor has accepted or rejected ~~the~~ a plan, or the creditor has otherwise ~~or otherwise has~~ participated significantly in the case~~, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee elected~~

~~pursuant to § 705(a) or appointed pursuant to § 1102 of the Code~~. Rule 9014 governs a motion to withdraw a claim. The order may include ~~order of the court shall contain such~~ terms and conditions ~~as~~ which the court ~~deems~~ considers proper.

(b) EFFECT ON ACCEPTANCE OR REJECTION OF A PLAN. Unless the court orders otherwise, an authorized withdrawal of a claim ~~shall constitute~~ constitutes withdrawal of any related acceptance or rejection of a plan.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. The list of entities entitled to notice of the hearing on a creditor's withdrawal of a claim is deleted as unnecessary. See Rule 9014(c). The other amendments are stylistic.

Rule 3007. Objections to Claims

An objection to the allowance of a claim is treated as a motion governed by Rule 9014, except that (a) the motion shall be served at least 30 days before the hearing, and (b) an objection joined with a demand for relief of the kind specified in Rule 7001 is an adversary proceeding ~~shall be in writing and filed. A~~

~~copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding~~.

COMMITTEE NOTE

This rule is amended to clarify that an objection to the allowance of a claim is an administrative proceeding governed by Rule 9014. An objection is made by filing a motion in accordance with Rule 9014(b). But service of the motion must be made at least 30 days before the hearing date, rather than 20 days as is required for administrative motions under Rule 9014(c). The claimant may file a response under Rule 9014(d).

If an objection to a claim is joined with relief of the kind specified in Rule 7001, the objecting party must file and serve a complaint commencing an adversary proceeding under Part VII of these Rules.

The other amendments are stylistic.

Rule 3012. Valuation of <u>the Estate's Property Securing Lien</u> ~~Security~~

<u>On motion, the</u> court may determine the value of <u>a secured creditor's interest in the estate's interest in property</u> ~~a claim secured by a lien on property in which the estate has an interest on motion of any party in~~

~~interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct~~. The motion is governed by Rule 9014, and the holder of the secured claim shall be treated as an entity listed in Rule 9014(c)(1).

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. Other amendments are stylistic.

Rule 3013. Classification of Claims and Interests

~~For the purposes of the plan and its acceptance, the court may, on motion after hearing on notice as the court may direct,~~ On motion, the court may determine classes of creditors and equity security holders ~~pursuant to §§~~ under § 1122, § 1222(b)(1), ~~and~~ or § 1322(b)(1) of the Code for purposes of the plan and its acceptance. The motion is governed by Rule 9014.

COMMITTEE NOTE

This rule is amended to provide that the motion to determine classification of claims and interests is governed by Rule 9014. The other amendments are stylistic.

Rule 3015. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment Case or a Chapter 13 Individual's Debt Adjustment Case

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(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. A party in interest may object to confirmation of a plan by filing an objection before the plan is confirmed. The objecting party shall serve a copy of the objection ~~An objection to confirmation of a plan shall be filed and served~~ on the debtor, the debtor's attorney, and the trustee~~, and any other entity designated by the court~~ in the manner provided in Rule 9014(c)(2), and shall ~~be transmitted~~ transmit a copy to the United States trustee, before the plan is confirmed ~~confirmation of the plan~~. ~~An objection to confirmation is governed by Rule 9014.~~ Discovery may be obtained in the manner provided in Rule 9014(h). If no objection is ~~timely~~ filed, the court may determine, without receiving evidence, that the plan has been proposed in good faith and not by any means forbidden by law ~~without receiving evidence on such issues~~.

(g) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan under ~~pursuant to~~ § 1229 or § 1329 ~~of the Code~~ is made by motion governed by Rule

9014. Every creditor that would be affected by the proposed modification shall be treated as an entity listed in Rule 9014(c)(1), but a respondent is not required to serve the response on any creditor other than the movant unless the court directs otherwise. The motion shall include a copy or summary of the proposed modification. ~~shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any~~

~~other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.~~

COMMITTEE NOTE

Subdivision (f) is amended to conform to Rule 9014(a) which, as amended, will provide that an objection to confirmation of a plan under this rule is not governed by Rule 9014. Although an objection under Rule 3015(f) is not an administrative proceeding under Rule 9014, service of the objection must be made in the manner provided in Rule 9014(c)(2) and discovery may be obtained in the manner provided in Rule 9014(h).

Deletion of the phrase "any other entity designated by the court" from the entities entitled to receive copies of an objection is intended to avoid the appearance that an objecting party, before serving the objection, must inquire as to the proper parties to be served. This amendment is not intended to deprive the court of the power to require, in a particular case, that a copy of an objection be served on another entity.

Consistent with the amendments to Rule 9014, a copy of an objection must be served on the debtor's attorney.

Subdivision (g) is amended to provide that a request to modify a chapter 12 or chapter 13 plan after confirmation is an administrative proceeding governed by Rule 9014. The movant is required to serve all creditors that would be affected by the proposed modification.

The other amendments are stylistic.

Rule 3019. Modification of Accepted Plan Before Confirmation in a Chapter 9 Municipality Case or a Chapter 11 Reorganization Case

In a chapter 9 or chapter 11 case, after a plan

has been accepted and before its confirmation, the proponent may file a modification of the plan. If on motion the court finds ~~after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court~~ that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted the modification in writing ~~the modification~~, the plan as modified ~~it~~ shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan. Rule 9014 governs the motion.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. The list of entities entitled to notice is deleted as unnecessary because Rule 9014, which governs motions under this rule, includes a list of entities to be served. See the amendments to Rule 9014(c)(1).

Rule 3020. Deposit; Confirmation of a Plan in a Chapter 9 Municipality Case or a Chapter 11 Reorganization Case

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(b) ~~OBJECTION TO AND HEARING ON CONFIRMATION~~ CONFIRMATION OF A PLAN IN A CHAPTER 9 OR CHAPTER 11

CASE.

(1) *Objection to Confirmation*. Within the time fixed by the court, any ~~An~~ objection to confirmation of ~~the~~ a plan shall be filed and served in the manner provided in Rule 9014(c)(2) on the debtor, the debtor's attorney, the trustee, the proponent of the plan, and any committee appointed under the Code~~, and any other entity designated by the court, within a time fixed by the court~~. In a chapter 11 reorganization case, ~~Unless the case is a chapter 9 municipality case,~~ the objecting party shall transmit a copy of the ~~every~~ objection ~~to confirmation shall be transmitted by the objecting party~~ to the United States trustee within the time fixed for filing objections. Discovery may be obtained in the manner provided in Rule 9014(h). ~~An objection to confirmation is governed by Rule 9014.~~

****

COMMITTEE NOTE

Subdivision (b)(1) is amended to conform to Rule 9014(a) which, as amended, will provide that an objection to confirmation of a plan under this rule is not governed by Rule 9014. Although an objection to confirmation under Rule 3020(b) is not an administrative proceeding under Rule 9014, service of an objection must be made in the manner provided in Rule 9014(c)(2) and discovery may be obtained in

the manner provided in Rule 9014(h).

Deletion of the phrase that provided that the court may designate other entities to receive copies of an objection is intended to avoid the appearance that an objecting party, before serving an objection, must inquire as to the proper parties to be served. This amendment is not intended to deprive the court of the power to require, in a particular case, that a copy of an objection be served on any other entity.

Consistent with the amendments to Rule 9014, a copy of an objection must be served on the debtor's attorney.

The other amendments are stylistic.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY.

(1) *Procedures Governing Motion*. Rule 9014 governs a ~~A~~ motion for relief from an automatic stay provided by the Code or a motion to prohibit or condition the use, sale, or lease of property under ~~pursuant to~~ § 363(e) ~~shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter~~

~~11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct~~.

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(b) USE OF CASH COLLATERAL.

(1) *Procedures Governing Motion* ~~*Motion; Service*~~. Rule 9014 governs a ~~A~~ motion for ~~authorization~~ authority to use cash collateral ~~shall be made in accordance with Rule 9014 and shall be served on any entity which has an interest in the cash collateral, on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct~~. Every entity having an interest in the cash collateral shall be treated as an entity listed in Rule 9014(c)(1).

****

~~(3) *Notice.* Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.~~

(c) OBTAINING CREDIT.

(1) *Procedure Governing Motion* ~~*Motion; Service*~~. Rule 9014 governs a ~~A~~ motion for authority to obtain credit ~~shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct~~. The motion shall include ~~be accompanied by~~ a copy of the agreement relating to the credit to be obtained.

****

~~(3)~~ Notice. ~~Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by~~

~~paragraph (1) of this subdivision and to such other entities as the court may direct.~~

(d) AGREEMENT RELATING TO RELIEF FROM THE AUTOMATIC STAY, PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY, PROVIDING ADEQUATE PROTECTION, USE OF CASH COLLATERAL, ~~AND~~ OR OBTAINING CREDIT.

(1) *Administrative Proceeding*. ~~*Motion; Service.*~~ Except as provided in Rule 4001(d)(3), Rule 9014 governs a ~~A~~ motion for approval of an agreement:

(A) ~~to provide~~ providing adequate protection~~,~~;

(B) ~~to prohibit or condition~~ prohibiting or conditioning the use, sale, or lease of property~~,~~;

(C) ~~to modify or terminate~~ modifying or terminating the stay provided in § 362~~,~~;

(D) ~~to use~~ providing for the use of cash collateral~~,~~; or

(E) consenting to the creation of a lien senior or equal to an existing lien or interest in property of the estate ~~between the debtor and an entity that has a lien or interest in property of~~

~~the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.~~

(2) Copy of the Agreement. The motion shall ~~be accompanied by~~ include a copy of the agreement.

~~(2) *Objection*. Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the court~~

~~fixes a different time, objections may be filed within 15 days of the mailing of notice.~~

~~(3) *Disposition; Hearing.* If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than five days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.~~

~~(4)~~(3) *Procedure For Approval of Agreement* ~~*Agreement in Settlement of Motion*~~. The court may direct that the procedures prescribed in Rule 4001(d)(1) and (2) do ~~paragraphs (1), (2), and (3) of this subdivision shall~~ not apply, and that an ~~the~~ agreement of the kind listed in Rule 4001(d)(1) may be approved without further notice, if the court determines that a motion made under Rule 4001(a), (b) or (c) ~~pursuant to subdivisions (a), (b), or © of this rule~~ was sufficient to afford reasonable notice of the material provisions of the agreement and an opportunity to be heard.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. The list of parties entitled to service of the motion and notice of the hearing is deleted from Rule 4001(a), (b), and (c), because Rule 9014(c)(1) lists the entities that must be served. Other amendments are stylistic.

Rule 6004. Use, Sale, or Lease of Property

(a) NOTICE OF PROPOSED USE, SALE, OR LEASE OF PROPERTY. Notice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be given in accordance with ~~pursuant to~~ Rule 2002(a)(2), (c)(1), (i), and (k) and, if applicable, in accordance with § 363(b)(2) of the Code. The notice may include a date for a hearing to be held if a timely objection is filed.

(b) OBJECTION TO PROPOSAL. Except as provided in Rule 6004(c) or (d) ~~subdivisions (c) and (d) of this rule~~, an objection to a proposed use, sale, or lease of property ~~shall~~ may be filed and served ~~not~~ no less than five days before the date set for the proposed action or within the time fixed by the court. The objection shall be served on the entities listed in Rule 9014(c)(1). If a timely objection is filed and served,

the notice sent under Rule 6004(a) is treated as a motion for authority to use, sell, or lease the property, the objection is treated as a response, and Rule 9014 governs the proceeding. If the notice does not include a hearing date, a hearing date shall be included in the objection. ~~An objection to the proposed use, sale, or lease of property is governed by Rule 9014.~~

(c) SALE FREE AND CLEAR OF LIENS AND OTHER INTERESTS. Rule 9014 governs a ~~A~~ motion for authority to sell property free and clear of liens or other interests ~~shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold~~. The notice required by Rule 6004(a) ~~subdivision (a)~~ of this rule shall include the date of the hearing on the motion and the time within which objections may be filed and served ~~on the debtor in possession or trustee~~. An objection is treated as a response to a motion under Rule 9014(d)

(d) SALE OF PROPERTY VALUED UNDER $2,500. ~~Notwithstanding subdivision (a) of this rule, when~~ If all of the nonexempt property of the estate has an aggregate gross value less than $2,500, it shall be

sufficient to give all creditors, indenture trustees, committees appointed or elected under the Code, the United States trustee and other persons as the court may direct a general notice of intent to sell ~~such~~ the property other than in the ordinary course of business ~~to all creditors, indenture trustees, committees appointed or elected pursuant to the Code, the United States trustee and other persons as the court may direct~~. A party may object to the proposed sale ~~An objection to any such sale may be filed and served by a party in interest~~ within 15 days after ~~of the mailing of~~ the notice is mailed~~,~~ or within the time fixed by the court. An objection is governed by Rule 9014.

~~(e) HEARING. If a timely objection is made pursuant to subdivision (b) or (d) of this rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule.~~

****

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. Although the trustee or debtor in possession who sends a notice of proposed use, sale, or lease of property under § 363(b) does not need to obtain a court order and is not required to file a motion, if a timely objection is filed the notice is treated as a motion and the objection is treated as a response in a proceeding governed by Rule 9014.

The procedure is different if the property is to be sold free and clear of liens and other interests. The trustee or debtor in possession that wants to sell the property must file and serve a motion for authorization to sell it free and clear of liens and other interests. Notice of the proposed sale must be sent to all creditors and others under Rule 2002(a) and (c)(1), and the motion must be served in accordance with Rule 9014(c). An objection to the proposed sale is treated as a response to the motion, which is governed by Rule 9014.

Other amendments, including the rearranging of subdivisions, are stylistic.

Rule 6006. Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases

(a) PROCEEDING TO ASSUME, REJECT, OR ASSIGN. A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014. The other party to the contract or lease shall be treated as an entity listed in Rule 9014(c)(1).

(b) PROCEEDING TO REQUIRE TRUSTEE TO ACT. A proceeding by a party to an executory contract or unexpired lease in a chapter 9 municipality case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual's debt adjustment case, to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease is governed by Rule 9014. The other party to the contract or lease shall be treated as an entity listed in Rule 9014(c)(1).

~~(c) NOTICE. Notice of a motion made pursuant to subdivision (a) or (b) of this rule shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.~~

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rules 9014 and 9034. Subdivision (c) is deleted as unnecessary. Rule 9014(c)(1) lists the entities entitled to receive the motion papers and Rule 9034 requires transmittal of the motion papers to the United States trustee.

Rule 6007. Abandoning or Disposing ~~Abandonment or Disposition~~ of Property

(a) NOTICE OF PROPOSED ABANDONMENT OR DISPOSITION; OBJECTION ~~OBJECTIONS; HEARING~~. Unless the court directs ~~otherwise directed by the court~~, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code. A party in interest may file an objection to the proposed abandonment or disposition no later than 15 days after the notice is mailed ~~and serve an objection within 15 days of the mailing of the notice,~~ or within the time fixed by the court. ~~If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.~~ The objection is treated as a motion governed

by Rule 9014.

(b) MOTION BY PARTY IN INTEREST. A party in interest may file and serve a motion to require ~~requiring~~ the trustee or debtor in possession to abandon property of the estate. Rule 9014 governs the motion.

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COMMITTEE NOTE

This rule is amended to provide that an objection to a proposed abandonment or disposition of property is governed by Rule 9014. The objection is made by filing and serving a motion in accordance with Rule 9014 before the time for objecting expires. Other amendments are stylistic.

Rule 9006. Time

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(d) FOR MOTIONS RELATING TO A PENDING ADVERSARY PROCEEDING OR ADMINISTRATIVE PROCEEDING ~~— AFFIDAVITS~~. A written motion made in an adversary proceeding under Part VII of these rules or a written motion of the type described in Rule 9014(a)(4), other than one which may be heard ex parte, and notice of any hearing shall be served ~~not~~ no later than five days before the time specified for the ~~such~~ hearing, unless a different

period is fixed by these rules or by ~~order of~~ the court. ~~Such an order may for cause shown be made on ex parte application~~. For cause shown, the order fixing a different period may be made on ex parte application. When ~~a~~ the motion is supported by affidavit, the movant shall serve the affidavit ~~shall be served~~ with the motion. ~~; and, except as otherwise~~ Except as provided in Rule 9023, opposing affidavits may be served ~~not~~ no later than one day before the hearing, unless the court permits them to be served at some other time.

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COMMITTEE NOTE

Subdivision (d) is amended to limit it to motions made within adversary proceedings under Part VII of these rules, and to procedural or dispositive motions relating to pending administrative proceedings under Rule 9014. The time limits set forth in Rule 9006(d) do not apply if the motion is governed by another rule that fixes different time periods. For example, a motion for summary judgment under Rule 7056, which applies in an administrative proceeding under Rule 9014(l), is governed by the time periods fixed by Rule 56 F.R.Civ.P., rather than by Rule 9006(d).

Rule 9013. Application for an Order ~~Motions: Form and Service~~

(a) SCOPE OF THIS RULE. This rule governs a request for an order relating to any of the following:

(1) payment of income to a trustee under § 1225(c) or 1325(c) of the Code;

(2) joint administration under Rule 1015;

(3) conversion of a case under § 706(a) or § 1112(a);

(4) dismissal of a case under § 1208(b) or § 1307(b);

(5) approval of the appointment of an examiner or trustee in a chapter 11 case under § 1104 and in accordance with Rule 2007.1;

(6) enlargement of time under Rule 9006(b) if the request is made before the original or enlarged period has expired other than an order enlarging the time to take action under Rule 1007(c), 1017(e), 3015(a), 4003(b), 4004(a), 4007(c), 8002, or 9033;

(7) form of, manner of sending, or publication of a notice in a chapter 7, chapter 12, or chapter 13 case;

(8) notice to a committee under Rule 2002(i);

(9) notice under Rule 9020(b);

(10) examination of an entity under Rule 2004;

(11) deferral of the entry of an order granting a discharge under Rule 4004(c);

(12) reopening a case under § 350(b);

(13) conditional approval of a disclosure statement under Rule 3017.1; and

(14) protection of a secret, confidential, scandalous, or defamatory matter under Rule 9018.

(b) REQUEST FOR RELIEF. A request for an order governed by this rule shall be made by application. The application shall be in writing, unless it is made orally at a status conference or hearing at which all parties entitled to notice of the application are present. The application shall:

(1) state with particularity the relief sought and the grounds for that relief; and

(2) if in writing, be accompanied by proof of service under Rule 9013(c) and by a proposed order for the relief requested.

(c) SERVICE OF APPLICATION. No later than the time when a written application is filed, the applicant shall serve a copy of the application, any paper filed with the application, and the proposed order on the debtor, the debtor's attorney, the trustee, any committee elected under § 705 or appointed under § 1102, and any other entity required by federal law or

these rules, and shall transmit a copy to the United States trustee. Service shall be made in the manner provided in Rule 7004 for service of a summons, but the court by local rule may permit the notice to be served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.

(d) NO RESPONSE REQUIRED; ORDER WITHOUT A HEARING. A response to the application is not required, and the court may order relief without a hearing.

(e) SERVICE OF ORDER. If the court issues an order, the clerk shall serve a copy on the applicant, the entities listed in Rule 9013(c), and any other entity as the court directs.

~~A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee or debtor in possession and on those entities specified by these rules or, if service is not required or the entities to be served are not specified by these~~

~~rules, the moving party shall serve the entities the court directs.~~

COMMITTEE NOTE

Rules 9013 and 9014 have been amended to substantially revise the rules governing motion practice in bankruptcy cases.

Rule 9013 is amended to govern a category of procedures, called "applications," that relate to certain enumerated matters which, in most instances, are nonsubstantive and noncontroversial. This rule, as amended, is designed to enable parties to obtain court orders relating to these matters in a relatively short period of time. This rule does not preclude any party from requesting appropriate relief after an application is granted and an order is entered. See, e.g., Rule 9024.

These amendments provide greater detail relating to procedures for obtaining the enumerated types of orders. They are intended to increase uniformity in litigation practice among districts and to reduce the necessity for local rules governing these matters.

In most situations, a request to enlarge a time period under these rules is noncontroversial and may be made under Rule 9013. But the enlargement of time to take certain action under these rules may be controversial and, therefore, warrant the procedural safeguards afforded in an administrative proceeding under Rule 9014. In particular, a request for an order enlarging the time to file a motion to dismiss a chapter 7 case under § 707(b) and Rule 1017(e), to file a chapter 12 plan in accordance with Rule 3015(a), to file an objection to the list of property claimed as exempt in accordance with Rule 4003(b), to file a complaint objecting to discharge under Rule 4004(a), to file a complaint to determine the dischargeability of a debt under § 523(c) and Rule 4007(c), to file a notice of appeal under Rule 8002, or to file an objection to proposed findings of fact and conclusions of law under Rule 9033, is

an administrative proceeding governed by Rule 9014. In contrast, a request for an order enlarging the time to file schedules and statements is governed by Rule 1007(c), rather than 9013 or Rule 9014, so that the order may be issued without any notice.

Rule 9014. Administrative Proceeding ~~Contested Matters~~

(a) SCOPE OF THIS RULE. This rule governs any request for an order other than the following:

(1) a petition commencing a case under § 301, 302, or 303 of the Code, or a petition commencing a case ancillary to a foreign proceeding under § 304;

(2) a proceeding or request for relief of the type described in Rule 1006(b), 1006(c), 1007(c), 1010, 1011, 1013, 1017(e)(2), 1018, 2014, 3015(f), 3017, 3020(b), 4001(a)(2), 7001, or 9013(a);

(3) a motion made in an adversary proceeding under Part VII of these rules;

(4) a motion that addresses only a procedural matter relating to, or a dispositive motion within, a pending administrative proceeding, except as provided in Rule 9014(h) or Rule 9014(m);

(5) a motion under Part VIII of these rules or

any motion relating to an appeal to the district court or the bankruptcy appellate panel.

(b) REQUEST FOR RELIEF. A request for an order governed by this rule shall be made by written motion entitled "administrative motion." The motion shall:

(1) state with particularity the relief sought and the grounds for that relief;

(2) be accompanied by proof of service and by a proposed order for the relief requested; and

(3) unless the movant is an individual debtor whose debts are primarily consumer debts, be accompanied by:

(A) one or more supporting affidavits; and

(B) if the value of property is an issue, a valuation report has been prepared, and the movant intends to introduce the valuation report as evidence, a copy of that report, with the name, address, and telephone number of the person who prepared it.

(c) SERVICE OF MOTION AND NOTICE OF HEARING.

(1) Except as provided in Rule 3007 or 9014(f), at least 20 days before the hearing date, the movant shall serve a copy of the administrative motion, a copy of any paper filed with it, and notice of the hearing on the following:

(A) any entity against whom relief is sought;

(B) the debtor;

(C) the debtor's attorney;

(D) the trustee;

(E) any committee elected under § 705 or appointed under § 1102, or, if the case is a chapter 9 case or a chapter 11 case and no committee of unsecured creditors has been appointed, on the creditors included in the list filed under Rule 1007(d);

(F) any entity that has a lien on or other interest in property if the lien or interest may be affected by the requested relief; and

(G) any other entity entitled to service by federal law or these rules.

(2) Service shall be made in the manner provided in Rule 7004 for service of a summons, but the court by local rule may permit service by electronic means that are consistent with technical standards, if any, that the Judicial Conference establishes.

(3) The notice of the hearing shall conform to any appropriate Official Form and shall include:

(A) the date, time, and place of the hearing;

(B) the time to file a response; and

(C) a statement that if a response is not timely filed, the court may grant the motion without a hearing.

(d) RESPONSE.

(1) A response to an administrative motion may be filed no later than 5 days before the hearing date.

(2) No later than the time when a response is filed, the responding party shall serve a copy of the response on the movant and the entities listed in Rule 9014(c)(1) in the

manner prescribed by Rule 9014(c)(2).

(3) A response shall be accompanied by proof of service and, unless the respondent is an individual debtor whose debts are primarily consumer debts, by:

(A) a proposed order for the relief requested;

(B) one or more supporting affidavits if there is a factual dispute;

(C) if the value of property is an issue, a valuation report has been prepared, and the respondent intends to introduce the valuation report as evidence, a copy of that report with the name, address, and telephone number of the person who prepared it.

(e) AFFIDAVITS. An affidavit filed in an administrative proceeding shall comply with Rule 56(e) F.R.Civ.P.

(f) INTERIM RELIEF. If a request for interim relief is included in an administrative motion, the movant shall take reasonable steps to provide all parties with the most expeditious service and notice of a preliminary hearing feasible and shall file an

affidavit specifying the efforts made. If a response is filed before the preliminary hearing, the respondent shall take reasonable steps to provide all parties with the most expeditious service and notice feasible before the preliminary hearing. At the preliminary hearing, the court shall determine the adequacy of the notice under the circumstances. Interim relief may be granted under Rule 4001(b)(2) or Rule 4001(c)(2), to the extent and under the conditions stated in those rules.

(g) ORDER WITHOUT A HEARING. If no response is timely filed, the court may order relief without a hearing to the extent provided in § 102(1), or may notify the movant, and any other entity the court considers appropriate, that a hearing will be held.

(h) DISCOVERY. Unless the court directs otherwise, Rules 26 and 28-37 F.R.Civ.P. apply, except that:

(1) the parties are not required to make the disclosures mandated by Rule 26(a)(1)-(3), F.R.Civ.P., other than as provided in Rule 9014(b) and (d), but the information described in Rule 26(a)(1)-(3) F.R.Civ.P. may be obtained by discovery methods prescribed by Rule 26(a)(5) F.R.Civ.P.;

(2) the parties are not required to meet in

accordance with Rule 26(f) F.R.Civ.P.;

(3) the time periods provided in Rules 30(e), 33(b)(3), 34(b), and 36(a) F.R.Civ.P. are reduced to 10 days or as directed by the court; and

(4) the movant may begin discovery only after a response is filed or a respondent begins discovery. A respondent may begin discovery at any time.

(i) HEARING; STATUS CONFERENCE.

(1) HEARING.

(A) Except as provided in Rule 9014(i)(1)(B) or (3), if a timely response to an administrative motion is filed, the court shall hold a hearing to determine whether there is a genuine issue as to any material fact and, if not, whether any party is entitled to relief as a matter of law. No testimony may be taken at the hearing, unless the movant and all respondents consent. If the court finds that there is no genuine issue as to any material fact, it

shall order appropriate relief. If the court finds that there is a genuine issue of material fact, it shall conduct a status conference.

(B) On request or on its own initiative and on reasonable notice to the parties, the court may order that an evidentiary hearing at which witnesses may testify shall be held on the scheduled hearing date.

(2) STATUS CONFERENCE. A status conference under Rule 9014(i)(1)(A) may be held at the time fixed for the hearing, or immediately afterward without further notice to the parties. The attorneys for the movant and for every party against whom relief is sought that filed a timely response, and every party not represented by an attorney, shall appear and participate at the status conference. The purpose of the status conference is to expedite the disposition of the administrative proceeding. The court may enter a pretrial order requiring the disclosure of information of the type

described in Rule 26(a)(1)-(3) F.R.Civ.P., scheduling pretrial discovery, fixing the time for a hearing on factual issues, and otherwise providing for the just, speedy, and economical disposition of the proceeding.

(3) RELIEF FROM AUTOMATIC STAY; PRELIMINARY HEARING ON USE OF CASH COLLATERAL OR OBTAINING CREDIT. If an administrative motion requests relief from an automatic stay of any act against property of the estate under § 362(d), or includes a request for a preliminary hearing as provided in Rule 4001(b)(2) or (c)(2), a hearing at which witnesses may testify may be held at the time fixed for the hearing.

(j) TESTIMONY OF WITNESSES. Rule 43(e) F.R.Civ.P. does not apply at an evidentiary hearing on an administrative motion.

(k) SERVICE OF NOTICE THAT ORDER HAS BEEN ENTERED. Notice of the entry of any order shall be served in accordance with Rule 9022 on the movant, the entities listed in Rule 9014(c)(1), and any other entity as the court directs.

(l) APPLICATION OF PART VII RULES. Unless the court orders otherwise, the following rules apply in an administrative proceeding: Rules 7009, 7017, 7019-7021, 7025, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The court may at any stage in a particular matter order that one or more of the other rules in Part VII apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures made applicable by the order.

(m) PROCEDURAL OR DISPOSITIVE MOTION RELATING TO PENDING ADMINISTRATIVE PROCEEDING. Rule 7(b)(1) F.R.Civ.P. and Rule 9006(d) apply to a motion that addresses only a procedural matter relating to, or a dispositive motion made within, a pending administrative proceeding.

(n) TRANSMISSION TO UNITED STATES TRUSTEE. A copy of every paper filed and every order entered in connection with an administrative proceeding shall be transmitted to the United States trustee if required by Rule 9034.

(o) RELIEF FROM PROCEDURAL REQUIREMENTS. The court for cause may order that any procedural requirement provided in this rule shall not apply or shall be amended in a particular proceeding. The court shall

give the parties notice of the order to afford them a reasonable opportunity to comply with any amended procedural requirements.

~~In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such~~

~~time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.~~

COMMITTEE NOTE

Rules 9013 and 9014 have been amended to substantially revise the rules governing motion practice in bankruptcy cases.

Rule 9014 had been limited to the category of disputes called "contested matters." Confusion as to whether a particular motion was a contested matter, rather than a different type of proceeding, and uncertainty as to the procedural requirements relating to a contested matter, have led to the amendment of this rule.

These amendments provide more detailed procedural guidance than provided in the past. This change is intended to increase uniformity in litigation practice among districts and to reduce the number of local rules.

This rule, as amended, governs a proceeding that is not an application (governed by Rule 9013), an adversary proceeding (governed by Part VII), a request to pay the filing fee in installments or to waive the filing fee (governed by Rule 1006), a request for an extension of time to file schedules and statements (governed by Rule 1007(c)), a proceeding commenced on the court's own initiative to dismiss a case for substantial abuse of chapter 7 (governed by Rule 1017(e)(2)), a motion for an order approving the employment of a professional person (governed by Rule 2014), or a request for an order approving a disclosure statement or confirming a plan (governed by Rule 3015(f), 3017, or 3020(b)).

A motion made in either a pending adversary proceeding or in a pending administrative proceeding -- such as a motion for summary judgment, a motion to dismiss, or a motion for a protective order relating to discovery -- is not an administrative

proceeding governed by this rule. However, a procedural or dispositive motion relating to a pending administrative proceeding is governed by Rule 9014(m) and a motion relating to discovery is governed by Rule 9014(h). Any motion made in connection with an appeal to the district court or bankruptcy appellate panel (including a motion for a stay pending appeal, a motion for leave to appeal, or any motion under a rule in Part VIII) is excluded from the scope of Rule 9014.

Rule 9014(a) also clarifies that this rule does not apply to a petition commencing a case under the Code (governed by §§ 301-303 of the Code and Rules 1002-1005, 1010, 1011, 1013, and 1018), or a petition commencing a case ancillary to a foreign proceeding (governed by § 304 of the Code and Rules 1002, 1005, 1010, 1011, and 1018).

Numerous rules require or refer to the filing of a motion for certain relief. Unless the motion to which the rule refers is of the type listed in Rule 9014(a) as being outside the scope of this rule, the motion would commence an administrative proceeding and would be governed by Rule 9014. For example, Rule 3008 provides that a party in interest "may move for reconsideration of an order allowing or disallowing a claim against the estate." A motion requesting reconsideration under Rule 3008 commences an administrative proceeding and is governed by Rule 9014.

The amendments also increase certain time periods relating to these types of proceedings. For example, current Rule 9006(d) -- which formerly applied in contested matters -- provides that a motion and notice of hearing must be served at least 5 days before the scheduled hearing date. In contrast, amended Rule 9014 provides for service at least 20 days before the date scheduled for the hearing. This time period may be enlarged in accordance with Rules 9006(b) and 9013, or reduced in accordance with Rule 9006(c) or Rule 9014(o). The three-day "mail rule" under Rule 9006(f) does not apply with respect to these time periods because the time for acting in accordance with this rule is not triggered by service of any notice or other paper.

The amendments provide that a response may be filed no later than 5 days before the scheduled hearing date. See Rule 9014(d). It is important for practitioners to be aware of Rule 9006(a), which provides that time periods in the rules that are less than 8 days are determined without including in the computation intervening Saturdays, Sundays, and legal holidays.

Rule 9014(c) requires service of both the administrative motion and notice of the hearing, but there is no requirement that the motion and notice of hearing be in separate documents.

The court may order appropriate relief without a hearing if a timely response is not filed. If the judge wants to hold a hearing nonetheless, subdivision (g) requires that the court notify the movant that a hearing will be held. The court may hold the hearing at the originally scheduled time or on a subsequent date.

A hearing must be held if a response is filed. But, attorneys and unrepresented parties do not have to bring witnesses to the hearing unless (1) the proceeding is for relief from the automatic stay of acts against property of the estate, (2) the proceeding is for preliminary authority to use cash collateral or to obtain credit, or (3) the court gives reasonable notice to the parties that an evidentiary hearing may be held on the date when the hearing is schedule. Otherwise, if a response is filed, the court will hold a hearing only for purposes of determining whether an evidentiary hearing is necessary to resolve questions of fact and, if an evidentiary hearing is not necessary, to resolve the proceeding. If an evidentiary hearing is needed, the court will hold a status conference under Rule 9014(i)(2) to facilitate settlement discussions, set a discovery schedule, schedule an evidentiary hearing, or formulate any other pretrial order designed to expedite the proceeding. It is anticipated that the status conference will be held immediately following the court's determination that there is a genuine issue of material fact and, therefore, attorneys and unrepresented parties should attend the hearing prepared for an immediate status conference. Subdivision (i) does not preclude

the court from ordering a status conference under Rule 105(d).

If the court determines based on affidavits that there are genuine issues of material fact, and an evidentiary hearing is held to resolve the issues, witnesses must testify orally in open court in accordance with Rule 9017 and Civil Rule 43(a). Under Rule 9014(j), the court may not resolve these factual issues based on affidavits.

The amendments also require automatic disclosure regarding valuation reports when the value of property is at issue, the report has been prepared, and the party intends to introduce it as evidence. As used in this rule, the term "valuation report" includes a formal appraisal of the property, as well as any less formal written report on the value of the property.

Any party that files a paper in connection with an administrative proceeding is required to transmit a copy to the United States trustee, if the proceeding relates to any of the matters listed in Rule 9034.

Subdivision (o) gives the court discretion to order, for cause and in a particular proceeding, that any procedural requirement under this rule does not apply or is amended. But the requirements of this rule may not be abrogated by local rule or general order. The court for cause shown may enlarge or reduce any time periods prescribed by this rule in accordance with Rule 9006.

Rule 9017. Evidence

Except as provided in Rule 9014(j), ~~The~~ Federal Rules of Evidence and Rules 43, 44 and 44.1 F.R. Civ. P. apply in cases under the Code.

COMMITTEE NOTE

This rule is amended to conform to Rule 9014(j), which provides that Rule 43(e) F.R. Civ. P. does not apply at an evidentiary hearing in an administrative proceeding. The effect of Rule 9014(j) is that a witness must testify in open court, rather than by affidavit, at an evidentiary hearing in an administrative proceeding governed by Rule 9014.

Rule 9021. Entry of Judgment

Except as otherwise provided ~~herein~~ in this rule, Rule 58 F.R. Civ. P. applies in cases under the Code. Every judgment entered in an adversary proceeding or ~~contested matter~~ in an administrative proceeding shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. The reference in Rule 58 F.R. Civ. P. to Rule 79(a) ~~F.R. Civ. P.~~ shall be read as a reference to Rule 5003 of these rules.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014.

Rule 9034. Transmittal of Pleadings, Motion Papers, Objections, and Other Papers to the United States Trustee

Unless the United States trustee requests otherwise or the case is a chapter 9 municipality case, an ~~any~~

entity that files a pleading, motion, objection, or similar paper relating to any of the following matters shall transmit a copy ~~thereof~~ to the United States trustee within the time required by these rules for service of the paper:

(a) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business;

(b) a rejection, assumption, or assignment of an executory contract or unexpired lease;

~~(b)~~(c) the approval of a compromise or settlement of a controversy;

~~(c)~~(d) the dismissal of a case, transfer of case to another district, or conversion of a case to another chapter;

~~(d)~~(e) the employment of a professional person ~~persons~~;

~~(e)~~(f) an application for compensation or reimbursement of expenses;

~~(f)~~(g) a motion for, or approval of an agreement relating to, the use of cash collateral or authority to obtain credit;

(h) the appointment of an interim trustee before an order for relief in an

involuntary case;

~~(g)~~ (i) the election of a trustee or the appointment of a trustee or examiner in a chapter 11 reorganization case;

(j) a review of the appointment of a creditors' committee ;

~~(h)~~ (k) the approval of a disclosure statement;

~~(i)~~ (l) the confirmation of a plan;

~~(j)~~ (m) an objection to, or the waiver or revocation of, the debtor's discharge;

~~(k)~~ (n) any other matter ~~in which~~ when the United States trustee requests ~~copies~~ a copy of filed papers or the court orders ~~copies~~ a copy transmitted to the United States trustee.

COMMITTEE NOTE

Several rules have contained provisions requiring that notice of a hearing on a particular matter be transmitted to the United States trustee. See, e.g., Rules 1014, 2001(a), 2007(a), 4001, and 6007. Those provisions have been deleted and replaced with the additional matters added to the list in Rule 9034. In addition, the election of a chapter 11 trustee under § 1104 is added to the list in this rule so that the United States trustee will receive all papers relating to the election. Other amendments are stylistic.

Item C

C. Proposed Amendments to Bankruptcy Rules 1007, 1017, 2002, 4003, 4004, and 5003 Submitted for Approval to Publish.

1. *Synopsis of Proposed Amendments.*

(a) Rule 1007(m) is amended to provide that, if a governmental unit is a creditor, the debtor is required to identify in the lists and schedules filed under this rule the applicable department, agency, or instrumentality of the governmental unit, if known to the debtor. This amendment is designed to facilitate more effective notice to governmental creditors.

(b) Rule 1017(e) is amended to permit the court to grant a timely request for an extension of time to file a motion to dismiss a chapter 7 case under §707(b), whether the court rules on the request before or after the expiration of the 60-day time limit for filing the extension request.

(c) Rule 2002(j) is amended to require that the address of any notice mailed to the United States attorney under this paragraph identify the particular department, agency, or instrumentality through which the debtor is indebted to the United States. This amendment is designed to better enable the United States attorney to direct notices to the appropriate governmental officials.

(d) Rule 4003(b) is amended to permit the court to grant a timely request for an extension of time to object to a list of claimed exemptions, whether the court rules on the request before or after the expiration of the 30-day time limit for filing an objection.

(e) Rule 4004(c)(1) is amended to delay the granting of a discharge in a chapter 7 case while a motion for an extension of time to file a motion to dismiss the case under § 707(b) is pending.

(f) Rule 5003 is amended to permit the United States and the state in which the court is located to file statements designating safe harbor mailing addresses for notice purposes. The amendment requires the clerk to maintain a register of these addresses. Failure to use a mailing address in the register does not invalidate any notice that is otherwise effective under applicable law.

2. *Text of Proposed Amendments to Rules 1007, 1017, 2002, 4003, 4004, and 5003.*

Rule 1007. Lists, Schedules, and Statements; Time Limits

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(m) Identifying a Governmental Unit. If the debtor lists a governmental unit as a creditor in any list or schedule filed under Rule 1007, the debtor shall identify, if known to the debtor, any department, agency, or instrumentality of the governmental unit through which the debtor is indebted. Failure to comply with this paragraph does not affect the debtor's legal rights.

COMMITTEE NOTE

Governmental units, including federal, state and municipal governments, may have difficulty or may experience delay in identifying the particular department or agency through which a debt is owed. To facilitate earlier and more effective participation by governmental units who are creditors in bankruptcy cases, Rule 1007(m) has been added to require the debtor to identify in the lists and schedules filed under this rule the particular department, agency, or instrumentality of the governmental unit through which the debtor is indebted, if the debtor knows this information. But if the debtor fails to comply with this requirement, such failure does not affect the debtor's legal rights.

Rule 1017. Dismissal or Conversion of Case; Suspension

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(e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. The court may dismiss an individual debtor's case for substantial abuse under § 707(b) only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entities as the court directs.

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed by the United States trustee before the time has expired, the court for cause extends the time for filing the motion to dismiss. The United States trustee shall set forth in the motion all matters to be submitted to the court for its consideration at the hearing.

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COMMITTEE NOTE

This rule is amended to permit the court to grant a timely request filed by the United States trustee for an extension of time to file a motion to dismiss a chapter 7 case under § 707(b), whether the

court rules on the request before or after the expiration of the 60-day period.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

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(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

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(6) ~~hearings on all applications for compensation or reimbursement of expenses totaling in excess of $500~~ a hearing on any entity's request for compensation or reimbursement of expenses if the request exceeds $1,000;

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(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under this rule shall be mailed:

(1) in a chapter 11 reorganization case in which the Securities Exchange Commission has filed either a notice of appearance in the case or a written

request to receive notices, to the Securities and Exchange Commission at any place the Commission ~~designates~~ has designated in the notice of appearance or the written request ~~, if the Commission has filed either a notice of appearance in the case or a written request to receive notices~~;

(2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C.;

(3) in a chapter 11 case, to the District Director of Internal Revenue for the district in which the case is pending;

(4) if the papers filed in the case disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.; and

~~(4)~~ (5) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor ~~became~~ is indebted. ~~, or if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C~~. The department, agency, or instrumentality shall be identified in the address of the notice mailed to the

United States attorney.

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COMMITTEE NOTE

Paragraph (a)(6) is amended to increase the dollar amount from $500 to $1,000. The amount was last amended in 1987, when it was changed from $100 to $500. The amendment also clarifies that the notice is required only if a particular entity is requesting more than $1,000 as compensation or reimbursement of expenses. If several professionals are requesting compensation or reimbursement, and only one hearing will be held on all applications, notice under paragraph (a)(6) is required only with respect to the entities that have requested more than $1,000. If each applicant requests $1,000 or less, notice under paragraph (a)(6) is not required even though the aggregate amount of all applications to be considered at the hearing is more than $1,000.

If a particular entity had filed prior applications or had received compensation or reimbursement of expenses at an earlier time in the case, the amounts previously requested or awarded are not considered when determining whether the present application exceeds $1,000 for the purpose of applying this rule.

Subdivision (j) is amended to require that the address of any notice mailed to the United States attorney under Rule 2002(j) identify the particular department, agency or instrumentality through which the debtor is indebted to the United States. This requirement may be satisfied by including in the address either the name or an acronym commonly used to identify the department. For example, this requirement may be satisfied by addressing the notice to "United States Attorney (SBA)" if the debt is owed through the Small Business Administration. If the debtor is indebted to the United States through more than one department, agency or instrumentality, each should be identified in the address.

Other amendments to Rule 2002 are

stylistic.

Rule 4003. Exemptions

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(b) ~~OBJECTIONS~~ OBJECTING TO A CLAIM OF EXEMPTIONS. ~~The trustee or any creditor may file objections~~ An objection to the list of property claimed as exempt may be filed by the trustee or a creditor only within 30 days after ~~the conclusion of~~ the meeting of creditors held ~~pursuant to Rule 2003(a)~~ under §341(a) is concluded or within 30 days after ~~the filing of~~ any amendment to the list or supplemental schedules is filed, whichever is later. ~~unless, within such period, further time is granted by the court.~~ The court may, for cause, extend the time for filing objections if, before the time to object expires, the trustee or a creditor files a request for an extension. Copies of the objections shall be delivered or mailed to the trustee, ~~and to~~ the person filing the list, and the attorney for ~~such~~ that person.

COMMITTEE NOTE

This rule is amended to permit the court to grant a timely request for an extension of time to file objections to the list of claimed, whether the court rules on the request before or after the expiration of the 30-day period. The purpose of

this amendment is to avoid the harshness of the present rule which has been construed to deprive a bankruptcy court of jurisdiction to grant a timely request for an extension if it has failed to rule on the request within the 30-day period. See In re Laurain, 113 F.3d 595(6th Cir. 1997); In re Stoulig, 45 F.3d 957 (5th Cir. 1995); In re Brayshaw, 912 F.2d 1255 (10th Cir. 1990). The amendment also clarifies that the extension may be granted only for cause. Other amendments are stylistic.

Rule 4004. Grant or Denial of Discharge

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(c) GRANT OF DISCHARGE.

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case ~~pursuant to~~ under Rule 1017(e), the court shall forthwith grant the discharge unless:

****

(e) a motion to extend the time for filing a complaint objecting to discharge is pending, ~~or~~

(f) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending, or

~~(f)~~(g) the debtor has not paid in full the filing fee prescribed by 28 U.S.C.

§1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. §1930(b) that is payable to the clerk upon the commencement of a case under the Code.

****

COMMITTEE NOTE

Subdivision (c) is amended so that a discharge will not be granted while a motion requesting an extension of time to file a motion to dismiss the case under § 707(b)is pending.

Rule 5003. Records Kept By the Clerk

****

(e) *Register of Mailing Addresses of Federal and State Governmental Units*. The United States or the state or territory in which the court is located may file a statement designating its mailing address. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes these mailing addresses, but the clerk is not required to include in the register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. If more than one address for a department, agency, or

instrumentality is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and mailing notice to only one applicable address is sufficient to provide effective notice. The clerk shall update the register annually, effective January 2 of each year. The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.

~~(e)~~ (f) *Other Books and Records of the Clerk.* The clerk shall ~~also~~ keep ~~such~~ any other books and records ~~as may be~~ required by the Director of the Administrative Office of the United States Courts.

COMMITTEE NOTE

Subdivision (e) is added to provide a source where debtors, their attorneys, and other parties may go to determine whether the United States or the state or territory in which the court is located has filed a statement designating a mailing address for notice purposes. By using the address in the register -- which must be available to the public -- the sender is assured that the mailing address is proper. But the use of an address that differs from the address included in the register does not invalidate the notice if it is otherwise effective under applicable law.

The register may include a separate mailing address for each department, agency, or

instrumentality of the United States or the state or territory. This rule does not require that addresses of municipalities or other local governmental units be included in the register, but the clerk may include them.

Although it is important for the register to be kept current, debtors, their attorneys, and other parties should be able to rely on mailing addresses listed in the register without the need to continuously inquire as to new or amended addresses. Therefore, the clerk must update the register, but only once each year.

To avoid unnecessary cost and burden on the clerk and to keep the register a reasonable length, the clerk is not required to include more than one mailing address for a particular agency, department, or instrumentality of the United States or the state or territory. But if more than one address is included, the clerk is required to include information so that a person using the register could determine when each address should be used. In any event, the inclusion of more than one address for a particular department, agency, or instrumentality, does not impose on a person sending a notice the duty to send it to more than one address.

Item 6D

D. Proposed Amendments to Official Bankruptcy Form 1 (Voluntary Petition) and Official Bankruptcy Form 7 (Statement of Financial Affairs) Submitted for Approval to Publish.

1. *Synopsis of Proposed Amendments to Official Forms.*

(a) Form 1 (Voluntary Petition) is amended to require the debtor to disclose whether the debtor owns or has possession of any property that poses a threat of imminent and identifiable harm to public health or safety. If there is such property, the debtor must complete a new exhibit to the petition containing relevant information. The exhibit will alert the United States trustee and the person selected as trustee in the case that immediate precautionary action may be necessary.

(b) Form 7 (Statement of Financial Affairs) is amended to provide more information about the debtor that will be useful to taxing authorities, pension plan supervisors, and governmental units charged with environmental protection and regulation.

2. *Copy of Proposed Amendments to Official Bankruptcy Forms 1 and 7.*

(Official Form 1) (9/97)

FORM B1

United States Bankruptcy Court
_____ District of _____

Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Soc. Sec./Tax I.D. No. (if more than one, state all):	Soc. Sec./Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, State & Zip Code):	Street Address of Joint Debtor (No. & Street, City, State & Zip Code):
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):	Mailing Address of Joint Debtor (if different from street address):
Location of Principal Assets of Business Debtor (if different from street address above):	

Information Regarding the Debtor (Check the Applicable Boxes)

Venue (Check any applicable box)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Type of Debtor (Check all boxes that apply)

☐ Individual(s)
☐ Corporation
☐ Partnership
☐ Other _____
☐ Railroad
☐ Stockbroker
☐ Commodity Broker

Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)

☐ Chapter 7
☐ Chapter 9
☐ Chapter 11
☐ Chapter 12
☐ Chapter 13
☐ Sec. 304 - Case ancillary to foreign proceeding

Nature of Debts (Check one box)

☐ Consumer/Non-Business
☐ Business

Filing Fee (Check one box)

☐ Full Filing Fee attached
☐ Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

Chapter 11 Small Business (Check all boxes that apply)

☐ Debtor is a small business as defined in 11 U.S.C. § 101
☐ Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)

Statistical/Administrative Information (Estimates only)

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors	1-15	16-49	50-99	100-199	200-999	1000-over
	☐	☐	☐	☐	☐	☐

Estimated Assets	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Debts	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Voluntary Petition
(This page must be completed and filed in every case)

Name of Debtor(s):

Prior Bankruptcy Case Filed Within Last 6 Years (If more than one, attach additional sheet)

Location Where Filed:	Case Number:	Date Filed:

Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)

Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (If not represented by attorney)

_____
Date

Signature of Attorney

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____
Telephone Number

_____
Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

X _____
Signature of Attorney for Debtor(s) Date

Exhibit C

Does the debtor own or have possession of any property that poses a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.
☐ No

Signature of Non-Attorney Petition Preparer

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed Name of Bankruptcy Petition Preparer

_____
Social Security Number

_____
Address

_____

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

X _____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. §110; 18 U.S.C. §156.

Form B1, Exhibit C
(Draft)

Exhibit "C"

[If, to the best of the debtor's knowledge, the debtor owns or has possession of property that poses a threat of imminent and identifiable harm to the public health or safety, attach this Exhibit "C" to the petition.]

[Caption as in Form 16B]

Exhibit "C" to Voluntary Petition

1. Identify and briefly describe all real or personal property owned by or in possession of the debtor that, to the best of the debtor's knowledge, poses a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

2. With respect to each parcel of real property or item of personal property identified in question 1, describe the nature and location of the dangerous condition, whether environmental or otherwise, that poses a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

COMMITTEE NOTE

The form has been amended to require the debtor to disclose whether the debtor owns or has possession of any property that poses a threat of imminent and identifiable harm to public health or safety. If any such property exists, the debtor must complete and attach Exhibit "C" describing the property, its location, and the potential danger it poses. Exhibit "C" will alert the United States trustee and any person selected as trustee that immediate precautionary action may be necessary.

Form 7
(Draft)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re: _____, (Name) Debtor

Case No. _____ (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1 - ~~15~~ 17 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions ~~16 – 21~~ 18 - 25. **If the answer to any question is "None," or the question is not applicable, mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the ~~two~~ six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or ~~person in control~~ owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any ~~person in control~~ owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

---

1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT SOURCE (if more than one)

There are no proposed amendments to

pages 2 through 5 of the form.

15. Prior address of debtor

None ☐ If the debtor has moved within the **two years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY

[The following question is new]

16. Spouses and Former Spouses

None ☐ If the debtor resides or resided in a community property state, commonwealth, or territory (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within the six-year period immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

NAME

~~16~~ 17. Nature, location and name of business

None ☐ a. If the debtor is an individual, list the names, addresses ,taxpayer identification numbers, nature of the businesses, and ~~addresses~~ beginning and ending dates of all businesses in which the debtor was an officer, director, partner,or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the ~~two~~ **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the ~~two~~ six years immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer identification numbers, nature of the businesses, and ~~addresses~~ beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within the ~~two~~ **six years** immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer identification numbers, nature of the businesses, and ~~addresses~~ beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within the ~~two~~ **six years** immediately preceding the commencement of this case.

NAME	TAXPAYER I.D. NUMBER	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES ~~OF OPERATION~~

None ☐ b. Identify any business listed in response to subdivision a., ~~b., or c.,~~ above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME	ADDRESS

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within the ~~two~~ six years immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or otherwise self-employed.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within the ~~two~~ six years immediately preceding the commencement of this case.)*

~~17~~ 18. Books, records and financial statements

None ☐ a. List all bookkeepers and accountants who within the ~~six~~ two **years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS	DATES SERVICES RENDERED

None ☐ b. List all firms or individuals who within the **two years** immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME	ADDRESS	DATES SERVICES RENDERED

None ☐ c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS

None ☐ d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the **two years** immediately preceding the commencement of this case by the debtor.

NAME AND ADDRESS	DATE ISSUED

~~18~~19. **Inventories**

None ☐ a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market or other basis)

None ☐ b. List the name and address of the person having possession of the records of each of the two inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS

~~19~~20. Current Partners, Officers, Directors and Shareholders

None ☐ a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST

None ☐ b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP

~~20~~21. Former partners, officers, directors and shareholders

None ☐ a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL

None ☐ b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION

~~21~~22. Withdrawals from a partnership or distributions by a corporation

None ☐ If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

[The following three questions are new]

23. Tax Consolidation Group.

None ☐ If the debtor is a corporation, list the name and federal taxpayer identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within the six-year period immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION	TAXPAYER IDENTIFICATION NUMBER

---

24. Pension Funds.

None ☐ If the debtor is not an individual, list the name and federal taxpayer identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within the six-year period immediately preceding the commencement of the case.

NAME OF PENSION FUND	TAXPAYER IDENTIFICATION NUMBER

---

25. Environmental Information.

For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law

---

None ☐ a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ b. List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT	DOCKET NUMBER	STATUS OR DISPOSITION

* * * * * *

There are no proposed amendments to

page 11 (signature page) of the form.

COMMITTEE NOTE

The form has been amended to provide more information to taxing authorities, pension fund supervisors, and governmental units charged with environmental protection and regulation. Four new questions have been added to the form, covering community property owned by a debtor and the debtor's non-filing spouse or former spouse (Question 16), any consolidated tax group of a corporate debtor (Question 23), the debtor's contributions to any employee pension fund (Question 24), and environmental information (Question 25). In addition, every debtor will be required to state on the form whether the debtor has been in business within six years before filing the petition and, if so, must answer the remaining questions on the form (Questions 18 - 25). This is an enlargement of the two-year period previously specified. One reason for the longer "reach back" period is that business debtors often owe taxes that have been owed for more than two years. Another is that some of the questions already addressed to business debtors request information for the six-year period before the commencement of the case. Application of a six-year period to this section of the form will assure disclosure of all relevant information.

Item 6E

Rules Committee
Meeting of June 18 - 19, 1998
Agenda Item 6E
Action Item

MEMORANDUM TO THE CHAIR AND MEMBERS OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

SUBJECT: Response to the Final Report of the National Bankruptcy Review Commission

This agenda item is before the Committee for the purpose of recommending to the Judicial Conference appropriate responses to eight rules-related recommendations of the National Bankruptcy Review Commission.

Background

The Bankruptcy Reform Act of 1994 contained a provision authorizing the creation of a National Bankruptcy Review Commission ("Commission") to "investigate and study issues and problems" and report to Congress, the Chief Justice, and the President its findings and conclusions "together with its recommendations for . . . legislative and administrative action." The Commission members were appointed in late 1995 and held a series of public meetings and discussions over the next two years. The Commission filed its final report, containing 172 recommendations, on October 20, 1997.

The Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee") is drafting responses to many of the recommendations and is compiling responses from other committees to those recommendations that address subjects outside the Bankruptcy Committee's areas of jurisdiction or expertise. The Bankruptcy Committees plans to present a complete set of recommended responses to the Judicial Conference for its consideration in September.

Discussion

The Commission's report is 1,300 pages long and includes almost 300 pages of dissenting opinions and separate views of individual commissioners. Although some recommendations were unanimous or had wide support, others are controversial and were adopted by divided vote, often 5 - 4. It is impossible to predict whether, when, or to what extent, the Commission's recommendations may be adopted by Congress and enacted into legislation. Several bankruptcy bills already have been introduced, for example, that would implement the Commission minority's views on consumer bankruptcy issues. Other recommendations, some of which received the unanimous support of the Commission, have been ignored by Congress, so far.

Many of the Commission's recommendations are substantive and are directed to Congress in the form of recommended amendments to the Bankruptcy Code or title 28 of the United States

Code. These proposals do not mention the Federal Rules of Bankruptcy Procedure and, if adopted by Congress, would not require any amendments to the Bankruptcy Rules. A number of substantive proposals that are addressed to Congress for legislative change, however, would require conforming rules amendments, if the statute were amended as suggested. Several of the Commission's recommendations directly address the Bankruptcy Rules in the context of related amendments to the Bankruptcy Code; these recommendations would need to be addressed only if Congress adopts the legislative proposals. A few of the Commission's recommendations concern proposals for amendments to the Bankruptcy Rules unrelated to legislative amendments.

Although many of the recommendations would require rules amendments only if the recommendations are adopted by Congress, a few are addressed directly to the Judicial Conference or the "Rules Committee." This Committee is being asked to respond primarily to those that address rules or official forms directly and that do not require antecedent legislative action. A few recommendations have been assigned that contain both legislative and rules recommendations: 1) Recommendation 1.3.1, concerning reaffirmation agreements; 2) Recommendation 2.3.2, concerning the consent of former partners in a partnership bankruptcy case; 3) Recommendation 2.4.10 concerning the appointment and powers of examiners; and 4) Recommendation 2.5.2, concerning ways to provide flexibility concerning disclosure statements and plans in small business reorganization cases. The proposed responses concerning the legislative portion of these recommendations have been developed in consultation with staff for the Bankruptcy Committee.

Each Commission recommendation assigned to this Committee has been set forth in the Attachment to this memorandum. Included with each recommendation are a statement of any existing position of either the Judicial Conference or any of its committees, a comment or explanation (if appropriate), and a recommendation for response by the Judicial Conference.

Recommendation:

That the Committee approve the attached recommendations for forwarding to the Bankruptcy Committee for compilation and submission to the Judicial Conference.

Advisory Committee on Bankruptcy Rules
Adrian G. Duplantier, Chairman

Attachment

ATTACHMENT

Chapter I. Consumer Bankruptcy — System Administration

Recommendation 1.1.4: *Rule 9011*

The Commission endorses the amended Rule 9011 of the Federal Rules of Bankruptcy Procedure, to become effective on December 1, 1997, which will make an attorney's presentation to the court of any petition, pleading, written motion, or other paper a certification that the attorney made a reasonable inquiry into the accuracy of that information, and thus will help ensure that attorneys take responsibility for the information that they and their clients provide.

Concise Summary of Judicial Conference Position:

Prior Committee Position: The Advisory Committee on Bankruptcy Rules drafted and proposed the amended rule and recognizes that the current rule implicitly may include an obligation on the part of the debtor's attorney to make reasonable inquiry into the facts reported on the schedules, statements, lists and amendments, even though these documents are signed only by the debtor.

Conference Position: The Judicial Conference recommended the amended rule to the Supreme Court in October 1996.

Comment:

The Advisory Committee on Bankruptcy Rules at its October 1998 meeting will consider amending the rule further to expressly provide that the attorney's obligation to make reasonable inquiry extends to a debtor's schedules, lists, statements, and amendments thereto. If the Advisory Committee determines that any amendments should be proposed, the Rules Enabling Act (28 U.S.C. § 2071 et seq.) specifies the procedures by which the amendments would become effective.

Recommendation:

That the Judicial Conference express thanks for the endorsement of the 1997 amendments to Rule 9011 and follow the procedures set forth in the Rules Enabling Act for considering further amendments and recommending them to the Supreme Court.

ATTACHMENT

Chapter I. Consumer Bankruptcy - Reaffirmation Agreements and the Treatment of Secured Debt

Recommendation 1.3.1

11 U.S.C. § 524(c) should be amended to provide that a reaffirmation agreement is permitted, with court approval, only if the amount of the debt that the debtor seeks to reaffirm does not exceed the allowed secured claim, the lien is not avoidable under the provisions of title 11, no attorney fees, costs, or expenses have been added to the principal amount of the debt to be reaffirmed, the motion for approval of the agreement is accompanied by underlying contractual documents and all related security agreements or liens, together with evidence of their perfection, the debtor has provided all information requested in the motion for approval of the agreement, and the agreement conforms with all other requirements of subsection (c).

Section 524(d) should be amended to delineate the circumstances under which a hearing is not required as a prerequisite to a court approving an agreement of the kind specified in section 524(c): a hearing will not be required when the debtor was represented by counsel in negotiations on the agreement and the debtor's attorney has signed the affidavit as provided in section 524(c), and a party in interest has not requested a judicial valuation of the collateral that is the subject of the agreement. If one or more of the foregoing requirements is not met, or in the court's discretion, the court shall conduct a hearing to determine whether an agreement that meets all of the requirements of subsection (c) should be approved. Court approval of an agreement signifies that the court has determined that the agreement is in the best interest of the debtor and the debtor's dependents and does not impose undue hardship on the debtor and the debtor's dependents in light of the debtor's income and expenses.

The Commission recommends that the Advisory Committee on Bankruptcy Rules of the Judicial Conference prescribe a form motion for approval of reaffirmation agreements that contains information enabling the court and the parties to determine the propriety of the agreement. Approval of the motion would not entail a separate order of the court.

Concise Summary of Judicial Conference Position:

Committee Position: The Advisory Committee on Bankruptcy Rules determined at its March 1998 meeting that the Advisory Committee could act on the recommendation concerning a form motion for approval of a reaffirmation agreement without waiting for congressional action to amend the Bankruptcy Code. Any proposed form could be based on the requirements of the current law. If Congress later were to enact legislation that would require changing any form prescribed, the

Advisory Committee could propose conforming amendments. The Advisory Committee has referred the matter to its forms subcommittee and anticipates considering a proposed official form at its October 1998 meeting.

Conference Position: The Judicial Conference has no prior position on the suggestions for amendments to the Bankruptcy Code that are contained in this recommendation. Concerning the recommendation for a new official form, Federal Rule of Bankruptcy Procedure 9009 authorizes the Judicial Conference to prescribe official forms, and the Judicial Conference frequently has exhorted Congress to allow the provisions of the Rules Enabling Act to operate as enacted.

Comment:

A reaffirmation agreement is a form of novation or new contract between a debtor and secured creditor by which, if the agreement is not rescinded by the debtor within the time allowed under 11 U.S.C. § 524(c), the debtor agrees to pay the creditor the full amount stated in the agreement, even though the collateral securing the loan is not worth as much as the debtor owes. Without a reaffirmation agreement, the debtor's personal liability for the amount of the debt would be discharged, and the creditor would receive only what it could realize from repossessing and reselling the collateral. The Commission recommends amending section 524(c) to effectively limit the amount of debt reaffirmed to the value of the collateral, to prohibit a creditor from adding additional charges, to require the creditor to submit proof of the original contract and of perfection of the security interest, and to make clear the circumstances under which a hearing on the agreement is not required. In addition the Commission recommends that the Advisory Committee on Bankruptcy Rules prescribe a form motion for approving a reaffirmation agreement that would enable the court and the parties to determine the propriety of the agreement.

Section 524(d) has proved confusing to courts and practitioners concerning when a court must hold a hearing on a reaffirmation agreement. Well-drafted amendments could make clear the circumstances under which a hearing must be held. Some courts have local rules that require a motion for approval of a reaffirmation agreement to include much of the documentation that the recommendation would require under the statute. Other aspects of the recommendation would establish a national standard for court approval of a reaffirmation agreement, a matter of substantive law. The procedure for prescribing an official form is specified in Federal Rule of Bankruptcy Procedure 9009. The Commission stated that no separate order approving a reaffirmation agreement should be required, which might violate Federal Rule of Bankruptcy Procedure 9021.

Recommendation:

That the Judicial Conference support proposed amendments to section 524(d) of the Code to (1) require appropriate documentation of a motion to approve a reaffirmation agreement and (2) clarify when a court must hold a reaffirmation hearing, but (3) take no position on the merits of amending section 524(c) to specify the standard for approval by the court of a proposed

reaffirmation agreement. Concerning the recommendation for a new official form, the Judicial Conference should allow the procedure for prescribing an official form under Federal Rule of Bankruptcy Procedure 9009 to go forward.

ATTACHMENT

Chapter 2: Partnerships

Recommendation 2.3.2 *Consent of Former Partners*

The Bankruptcy Code and Rules should be amended to clarify that, notwithstanding Recommendation 1 (defining "general partner"), a former general partner of a partnership is not, absent a specific court order to the contrary, required to consent to a voluntary petition by a partnership, to be served with a petition or summons in an involuntary case against a partnership, or to perform the duties of disclosure or procedural duties imposed on a general partner of a debtor partnership.

Concise Summary of Judicial Conference Position:

Prior Committee Position: The Advisory Committee on Bankruptcy Rules, as a policy matter, does not anticipate legislation but only proposes rules to implement legislation that has been enacted. In accordance with this policy, the Advisory Committee on Bankruptcy Rules at its March 1998 meeting adopted a "wait and see" position concerning this recommendation.

Conference Position: At its March 1994 meeting, the Judicial Conference restated to Congress the Conference's opposition to legislation that would amend the federal rules of procedure without following the procedures prescribed in the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077.

Comment:

Recommendation 2.3.2 clarifies that the expanded definition of "general partner" set out in the preceding recommendation (Recommendation 2.3.1) is not intended to encumber the commencement of voluntary or involuntary bankruptcy cases by or against a partnership by involving in the pleadings and service of process partners that have withdrawn from the partnership. Likewise, this recommendation relieves former partners of disclosure duties, unless the court orders otherwise.

This recommendation would require amending Rules 1004 and 1007(g) of the Federal Rules of Bankruptcy Procedure, but only if Congress were to amend the Bankruptcy Code by enacting the revised definition of "general partner" also recommended by the Commission. Although Congress has the authority to enact procedural rules for the courts directly, the Judicial Conference traditionally has opposed such congressional initiatives and exhorted Congress to defer to the provisions of the Rules Enabling Act.

Recommendation:

That the Judicial Conference urge Congress, if it enacts legislation, to defer to the provisions of the Rules Enabling Act for any procedural rules that may be required to implement changes in the Bankruptcy Code.

ATTACHMENT

Chapter 2: General Issues in Chapter 11

Recommendation 2.4.9 *Employee Participation in Bankruptcy Cases*

Changes to Official Forms, the U.S. Trustee program guidelines and the Federal Rules of Bankruptcy Procedure, are recommended to the Administrative Office of the U.S. Courts, the Executive Office of the U.S. Trustee, and the Rules Committee, as appropriate, in order to improve identification of employment-related obligations and facilitate the participation by employee representatives in bankruptcy cases. The Official Forms for the bankruptcy petition, list of largest creditors, and/or schedules of liabilities should solicit more specific information regarding employee obligations. The U.S. Trustee program guidelines for the formation of creditors' committees should be amended to provide better guidance regarding employee and benefit fund claims. The appointment of employee creditors' committees should be encouraged in appropriate circumstances as a mechanism to resolve claims and other matters affecting the employees in a Chapter 11 case.

Concise Summary of Judicial Conference Position:

Committee Position: The Advisory Committee on Bankruptcy Rules ("Advisory Committee") at its March 1998 meeting considered whether to refer this recommendation to its Subcommittee on Forms with instructions to draft proposed amendments to the official forms. The Advisory Committee determined that disclosure of employee-related obligations such as wages, benefits, and pension fund obligations already is required by the current schedules and, accordingly, that no amendments are necessary.

Conference Position: None.

Recommendation:

That the Judicial Conference inform Congress that the schedules that must be filed by a debtor (Official Form 6) already require disclosure of employee-related obligations and that action on the Commission's recommendation is unnecessary.

ATTACHMENT

Chapter 2: General Issues in Chapter 11

Recommendation 2.4.10 *Enhancing the Efficacy of Examiners and Limiting the Grounds for Appointment of Examiners in Chapter 11 Cases*

Congress should amend section 327 to provide for the retention of professionals by examiners for cause under the same standards that govern the retention of other professionals.

The Advisory Committee on Bankruptcy Rules of the Judicial Conference should consider a recommendation that Federal Rule of Bankruptcy procedure 2004(a) be amended to provide that "On motion of any party in interest or of an examiner appointed under section 1104 of title 11, the court may order the examination of any entity."

Congress should eliminate section 1104(c)(2), which requires the court to order appointment of an examiner upon the request of a party in interest if the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes or owing to an insider, exceed $5,000,000.

Concise Summary of Judicial Conference Position:

Committee Position: The Advisory Committee on Bankruptcy Rules at its March 1998 meeting considered this recommendation and declined to consider at this time proposing an amendment to Rule 2004 to include an examiner among those who may request an order authorizing an examination under Rule 2004, in part because the almost unlimited scope of such examinations conflicts with the limited duties of an examiner under section 1106(b) of the Bankruptcy Code. The Advisory Committee will monitor any case law that develops on the issue, so the Advisory Committee can reconsider its position, if appropriate.

Prior Conference Position: The Judicial Conference has no prior position concerning the Commission's proposals for amending the Bankruptcy Code to provide for the retention of professionals by examiners and limit the grounds for appointment of examiners in cases under chapter 11. At its March 1994 meeting, however, the Judicial Conference approved a recommendation of the Committee on the Administration of the Bankruptcy System that the circumstances under which a trustee, or trustee's firm, may also be retained as a professional by the trustee be restricted to four specific circumstances and agreed to seek a legislative amendment at an appropriate time. At its March 1994 meeting, the Judicial Conference also restated to Congress the Conference's opposition to legislation that would amend the federal rules of procedure without following the procedures prescribed in the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077.

ATTACHMENT

Recommendation:

That the Judicial Conference restate its support for limiting the circumstances under which a trustee or trustee's own firm can be retained as a professional by the trustee but take no position on this recommendation to permit examiners to retain professionals under the same standards that govern the retention of other professionals, because such a change in substantive bankruptcy law concerns a matter of public policy that is best addressed by Congress. That, with respect to the recommendation to consider an amendment to Rule 2004, the Judicial Conference note that the recommendation is addressed directly to the Advisory Committee on Bankruptcy Rules, which has considered the matter and determined, for the time being, simply to monitor any case law that develops and, accordingly, urge Congress to defer to the provisions of the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077.

ATTACHMENT

Chapter 2: Small Business Proposals

Recommendation 2.5.2 *Flexible Rules for Disclosure Statement and Plan*

Give the bankruptcy courts authority, after notice and hearing, to waive the requirements for, or simplify the content of, disclosure statements in small business cases where the benefits to creditors of fulfillment of full compliance with Bankruptcy Code § 1125 are outweighed by cost and lack of meaningful benefit to creditors which would exist if the full requirements of § 1125 were imposed:

The Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Rules Committee") shall be called upon to adopt, within a reasonable time after enactment, uniform safe-harbor standard forms of disclosure statements and plans of reorganization for small business debtors, after such experimentation on a local level as they deem appropriate. These forms would not preclude parties from using documents drafted by themselves or other forms, but would be propounded as one choice that plan proponents could make, which if used and completed accurately in all material respects, would be presumptively deemed upon filing to comply with all applicable requirements of Bankruptcy Code §§ 1123 and 1125. The forms shall be designed to fulfill the most practical balance between (i) on the one hand, the reasonable needs of the courts, the U.S. Trustee, and creditors and other parties in interest for reasonably complete information to arrive at an informed decision and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors; and

Repeal those provisions of 11 U.S.C. § 105(d) which are inconsistent with the proposals made herein, *e.g.*, those setting deadlines for filing plans.

Amend the Bankruptcy Code to expressly provide for combining approval of the disclosure statement with the hearing on confirmation of the plan.

Concise Summary of Judicial Conference Position:

Committee Position: The Advisory Committee on Bankruptcy Rules, as a policy matter, does not anticipate legislation but only proposes rules to implement legislation that has been enacted. In accordance with this policy, the Advisory Committee on Bankruptcy Rules at its March 1998 meeting adopted a "wait and see" position concerning this recommendation.

The Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee") in June 1993 approved a recommendation of its Subcommittee on Long Range Planning that Congress should consider amending § 1125 of the Bankruptcy Code to authorize the bankruptcy court to grant conditional approval of a disclosure statement, in order to streamline the processing of small chapter 11 cases. At its June 1995 meeting, the Bankruptcy Committee noted

that the conditional approval process had been enacted in the Bankruptcy Reform Act of 1994 for very small cases in which the debtor had elected special treatment as a small business. In light of the congressional action, the Bankruptcy Committee determined that its earlier recommendation should be reworded as a query for inclusion in a list of issues to be forwarded to the Commission for consideration.

Conference Position: None. At its March 1994 meeting, however, the Judicial Conference restated to Congress the Conference's opposition to legislation that would amend the federal rules of procedure without following the procedures prescribed in the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077.

Comment:

The Bankruptcy Code in section 1125 specifies that the proponent of a chapter 11 plan must provide to creditors and equity holders, through a disclosure statement approved by the court, all the information a typical investor would require to cast an informed voted on the plan. The Commission's view was that this prospectus-type disclosure statement, which is appropriate in large corporate reorganizations, is more of a costly burden than an aid to reorganization in small chapter 11 cases. The Bankruptcy Committee supports the Commissions' proposals to (1) allow the bankruptcy court, after notice and a hearing, to waive the requirements for, or simplify the content of, disclosure statements in small business cases, and (2) grant the court broad discretion to combine the disclosure and confirmation hearings in all small business cases.

This recommendation also would require amending the Federal Rules of Bankruptcy Procedure and prescribing a new official form, but only if Congress first amends the Bankruptcy Code to authorize the bankruptcy court, after notice and hearing, to waive the requirement for, or simplify the contents of, a disclosure statement and to combine approval of a disclosure statement with the hearing on confirmation of a plan. Although Congress has the authority to enact procedural rules for the courts directly, the Judicial Conference traditionally has opposed such congressional initiatives and exhorted Congress to defer to the provisions of the Rules Enabling Act.

Recommendation:

That the Judicial Conference express support for authorizing the bankruptcy courts to exercise greater flexibility in managing small business cases under chapter 11, but urge Congress, if it enacts legislation, to defer to the provisions of the Rules Enabling Act for any procedural rules or official forms that may be required to implement changes in the Bankruptcy Code.

ATTACHMENT

Chapter 2: Small Business Proposals

Recommendation 2.5.3 *Reporting Requirements*

To create uniform national reporting requirements to permit U.S. Trustees, as well as creditors and the courts, better to monitor the activities of Chapter 11 debtors, the Rules Committee shall be called upon to adopt, with (sic) a reasonable time after enactment, amended rules requiring small business debtors to comply with the obligations imposed thereunder. The new rules will require debtors to file periodic financial and other reports, such as month operating reports, designed to embody, upon the basis of accounting and other reporting conventions to be determined by the Rules Committee, the best practical balance between (i) on the one hand, the reasonable needs of the court, the U.S. Trustee, and creditors for reasonably complete information and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors. Specifically, the Rules Committee, shall be called upon to prescribe uniform reporting as to:

a. the debtor's profitability, *i.e.,* approximately how much money the debtor has been earning or losing during current and relevant recent fiscal periods;

b. what the reasonably approximate ranges of projected cash receipts and case disbursements (including those required by law or contract and those that are discretionary but excluding prepetition debt not lawfully payable after the entry of order for relief) for the debtor appear likely to be over a reasonable period in the future;

c. how approximate actual cash receipts and disbursements compare with results from prior reports;

d. whether the debtor is or is not (i) in compliance in all material respects with postpetition requirements imposed by the Bankruptcy Code and the Bankruptcy Rules and (ii) filing tax returns and paying taxes and other administrative claims as required by applicable nonbankruptcy law as will be required by the amended statute and rules and, if not what the failures are, and how and when the debtor intends to remedy such failures and what the estimated costs thereof are; and

e. such other matters applicable to small business debtors as may be called for in the best interests of debtors and creditors and the public interest in fair and efficient procedures under Chapter 11.

ATTACHMENT

Prior Committee Position: None.

Prior Conference Position: None.

Comment:

Recommendation 2.5.3 is part of a series on the subject of small business bankruptcy cases. Amendments to the Federal Rules of Bankruptcy Procedure would be triggered only if legislation is enacted as suggested by the Commission in other recommendations. Although a majority of districts already require regular financial reporting similar to that recommended, the Commission noted the lack of any express, national requirement in either the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

Current law assigns to the United States trustee program administered by the Department of Justice the responsibility for supervising the administration of estates in bankruptcy cases. 28 U.S.C. § 586. Regional United States trustees perform this function in all but six federal judicial districts; in the six districts of Alabama and North Carolina, bankruptcy administrators appointed by the circuit councils supervise the administration of bankruptcy estates. Accordingly, it might be more appropriate to assign to the Executive Office for United States Trustees the development of uniform reporting requirements for small business debtors in chapter 11.

Recommendation:

That the Judicial Conference take no position on the merits of this recommendation, but urge Congress, if it enacts legislation on the subject of small business cases under chapter 11 of the Bankruptcy Code, to defer to the provisions of the Rules Enabling Act for any procedural rules or official forms that may be required to implement changes in the Bankruptcy Code.

ATTACHMENT

Chapter 4: Taxation and the Bankruptcy Code

Recommendation 4.2.3

The Commission should submit to the Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Rules Committee") a recommendation that the Federal Rules of Bankruptcy Procedure require that notices demanding the benefits of rapid examination under 11 U.S.C. § 505(b) be sent to the office specifically designated by the applicable taxing authority for such purpose, in any reasonable manner prescribed by such taxing authority.

Concise Summary of Judicial Conference Position:

Committee Position: The Advisory Committee on Bankruptcy Rules ("Advisory Committee"), at its March 1998, meeting approved preliminary draft amendments to the bankruptcy rules that would require the clerk of the bankruptcy court to maintain a register of mailing addresses for federal and state governmental units. The mailing address for any particular agency would be provided by the agency and use of that address would be conclusively presumed to constitute effective notice on the agency. The Advisory Committee has forwarded the proposed amendments to the Committee on Rules of Practice and Procedure ("Standing Committee") with a request that they be published for comment. If ultimately prescribed by the Supreme Court and not blocked or altered by Congress, amendments to the bankruptcy rules implementing this recommendation would become effective December 1, 2000.

Prior Conference Position: None.

Comment:

The Advisory Committee has been working for several years, independently of the work of the Commission, on proposals to improve notice in bankruptcy cases to all governmental units. Preliminary draft amendments to the bankruptcy rules designed to accomplish that purpose have been forwarded to the Standing Committee with a request that they be published for comment. The proposed amendments will have a much broader effect than would have been accomplished by addressing only this recommendation.

Recommendation:

That the Judicial Conference express general support for the principle of facilitating adequate and effective notice in bankruptcy cases to governmental units and note that proposed amendments to the Federal Rules of Bankruptcy Procedure that would provide better notice to all federal and state governmental units have been published for comment.

II. Information Items

A. *Federal Rules of Attorney Conduct.*

The Advisory Committee discussed Professor Coquillette's draft of Federal Rules of Attorney Conduct and related materials. The Committee discussed the various alternative approaches set forth in Prof. Coquillette's memorandum to the Chairs and Reporters of the Advisory Committees dated February 11, 1998, and his memorandum to the Standing Committee dated December 1, 1997.

Although 3 members voted for the "do nothing" option, the consensus was in favor of the "dynamic conformity" option (adopting only a single uniform rule for all federal courts that adopts the current rules of the relevant state courts,similar to Rule 1 of the draft of Federal Rules of Attorney Conduct). But, the one rule should provide that the relevant state rules apply only to the extent they are not inconsistent with federal law (the Advisory Committee was most concerned with conflicts with the Bankruptcy Code or bankruptcy-related provisions of title 18 or title 28).

The Advisory Committee would not oppose the "core" federal rules approach for the Civil Rules. But if that approach is followed, more comprehensive study and drafting would be necessary to formulate "core" federal rules for bankruptcy cases. Such an effort would be a long-term project, probably requiring at least three years to complete.

B. *Local Rules.*

The Standing Committee asked the Advisory Committees for responses to the following questions regarding local rules:

(1) Should the effective date for all amendments to local rules be December 1? The Advisory Committee consensus is that this is not an important matter. Although it would not oppose such a uniform effective date, it is important to have flexibility for changes that must be implemented sooner. For example, legislative changes may require more immediate conforming amendments to local rules. In

the past, there have been amendments to the Bankruptcy Code that required changes to the Bankruptcy Rules. Because of the long time that it takes to amend a national rule, the Advisory Committee formulated suggested model local rules for immediate adoption. Unless such flexibility is provided to have an earlier effective date when warranted, a uniform effective date is not advisable. The reporter raised the question of whether adoption of a uniform effective date for local rules would require a statutory amendment to 28 U.S.C. § 2071(b).

(2) Should there be a condition precedent to the effectiveness of local rules (such as approval by the Judicial Council)? The majority of the Advisory Committee opposes such a condition. This change in local rule-making probably would require a statutory amendment to 28 U.S.C. § 2071(c)(2).

C. *Electronic Submission of Public Comments*

The Advisory Committees have been asked to give their views on a proposal to permit the public to comment on proposed rule amendments by e-mail. The suggestion is to permit e-mail comments for a trial period (two years), but that such e-mail comments would be exempt from the requirements that they be summarized by the reporter and acknowledged.

The Advisory Committee on Bankruptcy Rules discussed this issue and is in favor of permitting comments by e-mail for a trial period. However, the Advisory Committee believes that, if e-mail comments are allowed for a trial period, they should be treated the same as any other comments. They should be subject to the usual procedures that require comments to be summarized and acknowledged. Otherwise, it would create two classes of comments and would give the public the impression that e-mail comments are not treated as seriously as written comments.

D. *Shortening the Rules Promulgation Process.*

The Advisory Committee discussed briefly the suggestion that the rules promulgation process be shortened. The Committee believes that the time for rules promulgation is too long and would support efforts to shorten it.

E. *Recommendations of the National Bankruptcy Review Commission.*

The National Bankruptcy Review Commission was created by the Bankruptcy Reform Act of 1994 and was charged with performing a comprehensive two-year study of the American bankruptcy system. The Commission completed its work and submitted its final report to the President, Congress, and the Chief Justice on October 20, 1997. The report is approximately 1300 pages in length (including almost 300 pages of dissenting opinions and separate views of individual Commissioners) and contains 172 recommendations for improving the bankruptcy system. Although some recommendations had unanimous or wide support of the Commissioners, others were controversial and were adopted by a divided vote (often 5-4).

Most of the Commission's recommendations are addressed to Congress and call for legislative amendments to either title 11 or title 28. Several Commission recommendations are expressly directed to the Advisory Committee on Bankruptcy Rules and suggest amendments to the Rules or the Official Bankruptcy Forms that are not dependent on related legislation. The reporter presented summaries of these recommendations at the Advisory Committee meeting. The Advisory Committee discussed these summaries, determined which recommendations had been acted on already (such as those relating to improved notice to governmental units), referred a recommendation to the subcommittee on forms, and placed a recommendation on the agenda for the September 1998 meeting.

F. Proposed Bankruptcy Legislation

Several comprehensive bills have been introduced in the House of Representatives and Senate that would significantly change the Bankruptcy Code and related statutes. These bills expressly require the Advisory Committee or the Judicial Conference to amend or add new Bankruptcy Rules and Official Bankruptcy Forms. Any of these bills, if enacted, would require substantial revisions to the Rules and Forms. As of the date of this report, neither the Senate nor the House of Representatives has passed any of these bills. The Advisory Committee is monitoring these legislative developments closely.

Attachments:

Draft of minutes of Advisory Committee meeting of March 26-27, 1998.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 26 - 27, 1998

Winrock International Conference Center
near Morrilton, Arkansas

Draft Minutes

The following members were present at the meeting:

District Judge Adrian G. Duplantier, Chairman
District Judge Eduardo C. Robreno
District Judge Bernice B. Donald
District Judge Robert W. Gettleman
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge A. Thomas Small
Professor Charles J. Tabb
Professor Kenneth N. Klee
Henry J. Sommer, Esquire
Gerald K. Smith, Esquire
R. Neal Batson, Esquire
J. Christopher Kohn, Esquire, United States
Department of Justice
Professor Alan N. Resnick, Reporter

Circuit Judge A. Wallace Tashima, liaison to this Committee from the Committee on Rules of Practice and Procedure ("Standing Committee"), Bankruptcy Judge Paul Mannes, former chairman of the Committee, and Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"), also attended the meeting. Bankruptcy Judge George R. Hodges, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), attended part of the meeting on behalf of that committee.

The following additional persons attended the meeting: Joel Pelofsky, United States Trustee in Kansas City, Missouri, who represented Joseph G. Patchan, Director of the Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Channon, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Elizabeth C. Wiggins and Robert Niemic, Research Division, Federal Judicial Center ("FJC").

In addition, David B. Foltz, Jr., Esquire, from Houston, Texas, and Alan S. Tenenbaum,

Esquire, of the Environment and Natural Resources Division, United States Department of Justice, attended part of the meeting.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold.**

Introductory Items

The Chairman introduced Judge Tashima, Mr. Pelofsky, and the guests, and welcomed them to the meeting.

The Committee approved the draft minutes of the September 1997 meeting.

The Chairman reported on the January 1998 meeting of the Standing Committee. The Committee had no action items before the Standing Committee at the meeting. There were several topics discussed, however, on which the Standing Committee requested feedback from the Advisory Committees. One of these was whether there should be federal rules on attorney conduct which, the Chairman noted, was on the Committee's agenda for discussion later in the meeting.

Another topic was whether there should be a uniform date of December 1 on which local rules and amendments to local rules would take effect. The Reporter noted that local rules now take effect throughout the year, and an attorney can easily make the mistake of relying on a local rule that was changed a week or month earlier. The advantage of a uniform effective date, its proponents at the Standing Committee argued, is that practitioners would know they could rely on a rule for 12 months. Judge Mannes commented that a uniform date of December 1 sounded like a good idea, because it would mean that the local rules published in the various bankruptcy reference works would be the current ones. Mr. Kohn said he thought there should be provision for emergencies. The consensus was that random timing of local rules amendments is not a very significant problem, but that mandating a uniform effective date would be acceptable if there were provision for emergencies. The Committee noted that in bankruptcy there is the further problem of conforming to an ever-changing statute. Courts may need to prescribe interim rules to govern until conforming amendments to the national rules take effect about three years after statutory amendments are enacted.

The suggestion also was made at the Standing Committee meeting, the Reporter said, that the current procedure whereby local rules must be sent to the circuit council but take effect without any action by those entities should be reversed. In other words, the suggestion was, a local rule should not become effective until the circuit council had reviewed and approved it. The Reporter noted that implementing this suggestion would require amending 28 U.S.C. § 2071. The consensus was that any review and approval responsibility would require more resources

than currently available, and that circuit councils likely would review proposed local rules in the same manner as they review rules under the current review procedure. Judge Gettleman said such a review seems unnecessary when local attorneys participate in the drafting and many people review local rules before a district court prescribes them. The consensus of the Committee was that this proposal is not a good one.

A third topic is whether the rules committees should accept comments on published drafts sent by electronic mail ("e-mail"). The proposal, said the Reporter, is for a two-year experiment. E-mailed comments would receive only truncated response and would not have to be summarized by the reporters. Mr. McCabe noted that Judicial Conference procedures currently require that every written comment be acknowledged and that the author later receive a second letter describing what action was taken on that comment. Judge Kressel said the problem seems to be that the full-blown response may not be warranted for every comment, regardless of how it is transmitted. Professor Resnick said he did not want to become a censor of the comments, but would prefer that all comments be forwarded to the entire Committee. Some members said the Committee should see every comment, but not afford a full work-up to each one. Judge Robreno said the Committee should consider whether it really wants comments or not; he said he believed comments should come from as broad a group as possible. Judge Cordova said it would be best to see whether e-mailed comments actually become burdensome and, if they do, deal with the problem then. The consensus of the Committee was to try e-mail for a period, but treat e-mailed comments the same way written comments are treated now.

Lastly, the Reporter said, the rules committees had received letters from District Judge Terrell Hodges, chairman of the Executive Committee of the Judicial Conference, asking the committees to consider whether the rules process could be shortened, in order to expedite the process of amending rules. The consensus was that there should be an effort to speed up the process.

Judge Robreno reported on the recent meeting and activities of the Advisory Committee on Civil Rules ("Civil Rules Committee"). He noted that the Civil Rules Committee is proposing to revamp the discovery rules to restrict the scope of discovery in various ways, for example by limiting a deposition to one day or seven hours with court permission needed for going beyond that time. Proposed amendments to the discovery rules will be presented to the June 1998 meeting of the Standing Committee with a request that they be published for comment, he said. Judge Robreno also reported that the opt-out under the Civil Justice Reform Act would be ended, so that mandatory disclosure and a pre-discovery meeting of the parties would be required in every district. In addition, he said, the Chief Justice has appointed a group to work under the auspices of the Civil Rules Committee on problems in mass tort litigation. The group involves members of the Bankruptcy Committee and the Committee on Court Administration and Case Management and is to complete its work in one year.

Judge Kressel asked whether the bankruptcy rules should continue to permit opt-out, given the impending change in the civil rules. The Reporter said "the litigation package," to be

considered later in the meeting, would not make mandatory disclosures applicable in administrative motion matters, but that the amendment to the civil discovery rules would apply to adversary proceedings. Mr. McCabe said the Civil Rules Committee is working on a way to exempt simple cases, possibly by proposing an amendment to Rule 16. The overall plan for the civil and bankruptcy rules amendments would involve two litigation amendment packages moving together. Neither committee, however, has yet seen the other's work. It would be a mistake, he said, to publish inconsistent packages, and, therefore, each group needs to review the other's proposals. His preliminary review, he said, indicates that there is no inconsistency between the civil and bankruptcy proposals.

Action Items

Review of Comments to Preliminary Draft Amendments Published August 1997

The Reporter introduced the discussion and noted that the Committee had received 18 comment letters, 14 included in the agenda book and four received late and distributed with a separate memorandum. He also said that in reviewing the proposed amendments, he had discovered a need for a technical, conforming amendment to Rule 9006 that was not part of the published package. The published amendments would delete as unnecessary subdivision (b)(3) of Rule 1017, but Rule 9006 contains a reference to that subdivision. Accordingly, the Reporter recommended that Rule 9006 also be amended to delete the reference. **The Committee approved this recommendation by consensus.**

Professor Resnick also explained that the styling process with the Standing Committee had resulted in style differences between Rule 1017(e) as published with the draft amendments and Rule 1017(e) as it is proposed as part of "the litigation package." The Reporter said he planned to use the most recent version in both groups of amendments, avoiding changes to substantive amendments, however.

Most of the comments were directed to the amendments to the Rule 7062 package. Those who opposed the amendments did so on the ground that the amendments will slow down a case. The bankruptcy judges in California and Oregon, in particular, do not want a stay applied to an order lifting the automatic stay. One commentator suggested that a stay should apply only if a matter were really contested, and the Bankruptcy Law Section of the New Jersey State Bar suggested a three-day stay, rather than a ten-day stay. Professor Klee said an agreed order should not need a stay, and that since relief from stay seemed to have drawn the most objections, perhaps a three-day stay could be applied there. Judge Kressel, who chaired the subcommittee that developed the amendments, said the subcommittee had addressed all the matters raised in the comments and had rejected similar suggestions. It is sometimes difficult to know , after the fact, whether a matter was contested, he said. Moreover, people need to be able to ascertain later whether there was a stay in effect, he said. **The consensus was to leave the published draft unchanged.**

The comments were generally favorable on the proposed amendment to Rule 2002(a)(4) to delete the requirement to send notice to all creditors of a hearing on a motion to dismiss a case for failure by the debtor to file schedules and statements, although one writer did not appear to realize that creditors would receive notice if the case actually were dismissed. A member of the Committee, however, noted that Rule 2002(f), which provides for the later notice, does not have a time limit for sending the notice and does not include all entities that may have entered an appearance or filed a request for notice of everything filed. **The consensus, however, was to leave the published draft unchanged.**

The proposed amendments to Rules 4004 and 4007 would make it clear that the deadlines for filing a complaint objecting to discharge or to determine the dischargeability of a debt run from the first date scheduled for the meeting of creditors and not from the date the meeting actually was held, and that a motion to extend the deadline must be filed before the deadline expires. One commentator noted that the amendment also should afford guidance concerning what happens when a court does not rule on a timely filed motion until after the 60-day deadline expires. There is a split of authority on whether the motion becomes moot or the deadline is tolled. **The consensus was that this point should be addressed**, but not in the current proposed amendment, because the proposal had not been published. A member asked if there were a reason why Rule 4004(a) provides for 25 days notice of the deadline in a chapter 11 case and in Rule 4007(d) for 30 days notice in a chapter 13 case. The Reporter said that he was unaware of any reason and that conforming the notice periods also should be addressed at a future meeting.

The proposed amendments to Rule 1019(6) provide that the holder of an administrative expense claim incurred before a case is converted to chapter 7 must file a request for payment under § 503(a) of the Code, rather than a proof of claim. The Reporter noted that the comments on this amendment said that having to file a motion is a burden. In light of the comments, he asked whether the Committee wanted to consider adding to "a request for payment" the phrase "or a written statement requesting payment of an administrative expense." Judge Kressel said there is no requirement for an order to pay an administrative expense; most administrative expense claimants simply send bills that are paid. Professor Resnick responded that there appears to be a common perception that an order is required. Mr. Heltzel suggested permitting administrative expense claimants to use a proof of claim, a suggestion previously considered and rejected by the Committee, or drafting a new form to avoid the motion issue. Mr. Sommer said there is no requirement to file a motion, and the Committee should leave the proposed amendments as they are. He added that an administrative expense has no prima facie validity, like a proof of claim does, and the court may have to determine whether the expense was for the benefit of the estate. A member suggested that the Committee Note include a statement that the rule does not dictate the form of request. Professor Klee said the 90-day filing period prescribed by the rule should be changed to "a date fixed by the court," because in a chapter 11 case the 90-day period prescribed for cases under chapters 7, 12, and 13 does not apply. In order to accommodate the longer filing period afforded to a governmental unit under § 502(9) of the Code, the suggestion was made to change the sentence that addresses claims of governmental units to "within the later of the time fixed by the court or 180 days." **The proposed**

amendment, as changed so that the court would fix the time, was approved without objection. The Reporter inquired whether the Committee thought the proposed amendments could go forward without republication. Professor Resnick said he believed they could. The Chairman requested that the Committee Note also be edited to reflect the discussion.

On the second day of the meeting, the Reporter distributed a revised draft that reflected the changes approved by the Committee. In addition, the Reporter asked whether the Committee would want to withdraw the proposed conforming amendment to Rule 9006(c) that would deprive the court of discretion to shorten the filing period. **The consensus was to withdraw the proposed amendment to Rule 9006 and to delete from the Committee Note the reference to that rule.**

The Reporter said that the proposed amendments to Rule 7001(7) had drawn little comment until after the official comment period had expired, but that the Department of Justice and the Securities and Exchange Commission had sent comments which had arrived recently. Both agencies opposed the proposed amendments as affording opportunities for a plan proponent to obscure the presence of injunctive provisions, sidestep the procedural safeguards otherwise required to obtain injunctive relief, and thereby prejudice one or more parties in the case. Professor Klee said the proposed amendment would not shift the burden to the party against whom any injunctive provision would operate, in terms of the law, although in practice that might be so. He said that in partnership cases, injunctive provisions against non-contributing partners are necessary for the plan to work. Mr. Kohn said steamrolling does happen and that appeal of an order confirming a plan is often impractical for a private creditor, because of the requirement to post a bond. Professor Resnick noted that § 524(g) of the Code, which was enacted as part of the 1994 amendments, ratifies pre-existing channeling injunctions in asbestos cases. Mr. Tenenbaum said that without the procedural safeguards of an adversary proceeding, a plan proponent could bury a moratorium on environmental enforcement or similar provision in a plan, and Mr. Kohn noted that sometimes the person affected is not a creditor, but some third party. Mr. Batson said that sometimes an adversary proceeding is not practical. An example, he said, was the Dalkon Shield case in which there were 250,000 claimants against whom the channeling injunction was to operate.

The Reporter suggested that language could be added to the amendment to the effect that an adversary proceeding is required unless the plan provides "in conspicuous language" for one or more injunctive provisions. A member suggested tracking the language of Civil Rule 65(d) and adding language similar to "and the plan and order confirming the plan are in the form required by Rule 65(d)," but leaving out the part of Rule 65(d) that limits the injunctive effect to the parties to the action. Judge Robreno said he doubted the proposal really would prevent what he called the "drive-by injunction." Mr. Smith said every plan leads to an injunction today, binds everyone, and that it may be difficult to separate what is injunctive in a plan and what is not. Moreover, he said, § 524 says a discharge is an injunction. Professor Klee said the current rule is out of step with what occurs today. **A motion to adopt the amendments to Rule 7001 with the addition of a provision that, if the order confirming the plan includes an injunction it must**

be in the form required by Rule 65(d), carried.

On the second day of the meeting, the Reporter distributed a revised draft that added, starting on line 26, "and the order confirming the plan is in the form required by Rule 65, F.R.Civ.P," with an explanatory sentence also added to the Committee Note. Mr. Sommer said the proposed change was not an improvement, because it is often hard to ascertain what is injunctive. Judge Kressel also opposed the change on the ground that it leaves very unclear what is required or prohibited in a plan. Professor Klee suggested returning to the published draft, with its carve-out for a plan, and making only a stylistic change in line 2 to substitute another word for "Any." The Chairman suggested that the sentence should read: "The following are adversary proceedings:." **A motion to reinstate the published draft of Rule 7001 with the style change suggested carried with no objection.** Mr. Kohn said he remained concerned about specificity and consequences to affected parties and might bring the matter back to the Committee in the future.

The Reporter said the proposed amendments to Rules 1019(1)(b), 2003(d), and 7004(4) drew either no comments or only favorable ones.

There was no opposition to a motion to transmit the package of proposed amendments, as amended further in light of the public comments, to the Standing Committee with a recommendation for their adoption.

"The Litigation Package"

The Reporter introduced the package of amendments, explaining initially that the proposed amendments had been assembled in the agenda book in numerical order, rather that with Rules 9013 and 9014 first, as previously. He noted that the package had been approved, with some changes, at the September 1997 meeting, and subsequently had been reviewed by both the style subcommittee of the Standing Committee and the Committee's own style subcommittee, which met by conference call with the additional participation of Professor Klee. There remained, however, several open questions, he said.

Among the amendments approved at the September 1997 meeting, he said, was the deletion of Rule 9006(d), which governs the time for serving notice of hearings on motions and of any responsive affidavits. The reason for the proposed abrogation was potential conflict with the proposed amendments to Rules 9013 and 9014. Upon reconsideration, however, the Reporter said he believed Rule 9006(d) should not be abrogated but rather limited, so that it would affect only motions made in adversary proceedings and procedural motions and dispositive motions within Rule 9014 administrative proceedings, types of motions that are excluded from the scope of Rule 9014. Some members said they thought the cross-references in the draft amendment were unclear and suggested alternative approaches. Mr. Smith said resolution of the drafting problems should be left to the discretion of the Reporter. **A motion to approve the principle addressed in the draft amendment to Rule 9006(d) was unopposed.**

In addition, the Reporter said, he now believed the substance of Rule 9013, as it exists currently, does not appear in the proposed amendments and needs to be restored. Current Rule 9013 contains the basic requirements for a motion, *e.g.,* a motion "shall state with particularity the grounds therefor," etc. He had changed to the draft amendments to accomplish this objective by incorporating a cross-reference to Civil Rule 7(b)(1) in draft Rule 9014(m). **A motion to approve the amended draft was unopposed.**

The Chairman stated that votes on the above motions would be considered without compromise of the vote to be taken later in the meeting on the litigation package as a whole.

The Reporter next noted that the Committee previously had approved amendments that would provide new procedures for requests for court approval of the employment of professional persons, but had been unable to agree on new language to define the information that must be disclosed by the professional. Although the draft Rule 2014 would not be governed by Rule 9014, and would be a free-standing rule procedurally, the improvements already approved could go forward with the litigation package, leaving to further deliberation the issue of the scope of disclosure by the professional. Professor Klee said the Committee had been frustrated in its attempts to provide guidance in the rule by the language of § 101(14) and § 327(a) of the Code and that he favored going forward with the proposed amendments. Mr. Pelofsky said the United States trustee system especially supports the proposed requirement to supplement initial disclosures. The Reporter said that Mr. Rosen had telephoned with a suggestion that subdivisions (f) and (g) of the draft should be transposed to make it clear that the arrival of a new partner in a firm can necessitate supplemental disclosure. In addition, members suggested substituting "becoming aware of" for "discovering" in line 76 of the draft and inserting in the Committee Note language to make it clear that the intent of the rule is to require supplemental disclosure whether the fact of which the professional became aware occurred before or after the earlier disclosure. **The Committee approved including the amendments to Rule 2014, with the changes noted, as part of the proposed amendments to be published for comment.**

The Reporter stated that the style subcommittee, during its review of the proposed amendments, had noted that Rule 3012 needed substantial stylistic improvement and had requested the Reporter to redraft it. In particular, the subcommittee had noted that the rule erroneously refers to valuation of a claim rather than of property and that the title of the rule also needed to be changed to make a similar correction. Professor Klee said the title should be further changed to read "Valuation of the Estate's Property Securing Lien." **The Committee approved the re-styling of proposed Rule 3012, including Professor Klee's suggestion.**

The Reporter said further that at the September 1997 meeting the Committee had requested that he include a motion to modify a chapter 12 or chapter 13 plan after confirmation under Rule 3015(g) among the proceedings to which proposed Rule 9014 would apply. He said he had drafted amendments to Rule 3015(g) to accomplish that, but had placed in brackets at lines 24 - 26, the language indicating that a response to such a motion does not have to be served on creditors, and at lines 27 - 29, the complementary language to require the movant to include

with the motion the names and addresses of creditors affected by the modification. Mr. Sommer said he favored the language dispensing with service of a response on creditors, but said the rule should require that any response be served on the movant. He suggested inserting in line 25, after the word "creditor," the phrase "other than the movant." **The Committee approved the new draft, including Mr. Sommer's addition, and rejected the bracketed language at lines 27 - 29.**

The Reporter then directed the Committee's attention to the draft subdivision (c) of Rule 1006 which provides a procedure for a court to consider a request for waiver of the filing fee, if applicable law permits such waiver. This provision had been added, the Reporter said, at a time when a pilot program for *in forma pauperis* filing of bankruptcy cases had been in effect in six judicial districts. The pilot program had expired, leaving no authority for waiving the filing fee, and the Reporter recommended deleting the proposed amendment. Mr. Sommer, however, said that the definition of "filing fee" included in the rule covered fees other than the statutory fee prescribed in 28 U.S.C. § 1930(a) and these might be waivable, either under circuit decisions or under the terms of the miscellaneous fee schedule itself. Ms. Channon said that Judicial Conference policy is that no miscellaneous fee can be waived unless explicit authority to do so appears in the fee schedule. In addition, she said, the $15 trustee surcharge fee, which is payable at filing is prescribed in 11 U.S.C. § 330(b)(2) and is not tied to the chapter 7 filing fee as is the $45 trustee fee authorized under § 330(b)(1); rather, it must be paid by the judiciary to the trustee regardless of whether any money is collected. **The consensus was to delete subdivision (c) from the draft.**

The Chairman called for a motion on forwarding the litigation package and amendments to Rule 2014 to the Standing Committee with a request that the proposed amendments be published for comment, which motion was made and seconded. Judge Robreno stated that he incorporated his earlier comments on the amendments. **The motion carried by a vote of 8 to 2, with two members absent from the room. Judge Donald stated that she held Judge Cristol's proxy in favor of the motion, which would make the vote 9 to 2, and Judge Cristol stated on his return that he ratified her action.**

Introduction to the Litigation Package. Professor Resnick explained that this introduction, which the Committee had requested to be added to the package of amendments at the September 1997 meeting, had been drafted by himself and Professor Klee and circulated early for comments from Committee members. He said the introduction had been redrafted to reflect those comments and appeared in the agenda book together with an underline-and-strikeout version to show the changes that had been made.

Judge Robreno asked the purpose of the introduction, whether it was intended to promote support for the amendments or to explain alternatives. The Reporter said the purpose is to explain the package of amendments and how motion practice would be conducted if the amendments are adopted. National rules for motion practice are a new phenomenon and judges and practitioners probably will want some background and history of the amendments, along

with an explanation. For example, he said, the proposed amendments will be published in numerical order, and without some introduction, readers of amendments to Rule 1006 will not know they are reading conforming amendments and that the heart of the package is on page 60 or later, where Rules 9013 and 9014 will appear. Some members requested assurance that the Standing Committee would be informed that the Committee is divided concerning this package, and some wanted the fact of a minority view included in any published introduction. The Chairman said the Standing Committee would hear about the dissenting view, but he did not favor including that information in any published introduction. Other members agreed that no purpose would be served and that comments opposing the amendments and suggesting alternative approaches are certain to be received.

Professor Klee suggested that in line 127 the word "usually" should be inserted before the word "unrelated." Another member suggested that on page 9 of the draft a sentence should be added to highlight that subdivision (o) of Rule 9014, which provides for suspension of any requirement of the rule in a particular case, is not intended as a license to issue a general order or local rule effectively abrogating Rule 9014. The Reporter agreed to add a sentence to the introduction and to the Committee Note to Rule 9014 stating that the requirements of Rule 9014 may not be abrogated by general order or local rule. **The consensus was to forward the introduction, as amended at the meeting, to the Standing Committee with a request that it be published together with the Litigation Package, if the Standing Committee approves the Litigation Package for publication.**

Rule 9020

The Reporter introduced the proposed amendments, which would change the current rule to permit a bankruptcy judge to issue an order in a civil contempt proceeding that would be effective immediately, subject to appellate review. If the matter involved criminal contempt, the amendments would require the bankruptcy judge to submit proposed findings of fact and conclusions of law to the district court, and any order would issue from the district court. Amendments to Rule 9020 initially were proposed by Judge Small, who said, in a letter to the Chairman, that the rule's 10-day stay of the effect of a bankruptcy judge's order of contempt is unnecessary in light of circuit court decisions holding that bankruptcy judges have inherent power to punish for civil contempt. The Chairman said he would prefer a general statement that bankruptcy judges have authority to punish for contempt to the draft rule, which appeared to him to contain much legislating. Judge Gettleman said that subdivision (b)(2) was inappropriately restrictive; sometimes when the contempt involves disrespect or criticism of a judge, he said, the same judge should preside. Judge Tashima noted that civil contempt can involve long periods in jail and agreed with the concerns of the Justice Department about inciting questions regarding how far a bankruptcy judge constitutionally can go. Judge Kressel said the current rule also legislates, and that the line between civil and criminal contempt is not distinct and may have to be drawn by the courts. He suggested abrogating Rule 9020 entirely and stating in a Committee Note that the action does not indicate any lack of contempt authority. Judge Small said he is agreeable to abrogating the rule. Its original intent, he believed, was to increase the authority of a

bankruptcy judge but that the rule now inhibits that authority. **The Chairman appointed a subcommittee to recommend appropriate action concerning Rule 9020 at the next meeting. He appointed Judge Kressel to serve as chair and Judge Robreno, Judge Small, and Mr. Kohn as members.**

Attorney Conduct

The Standing Committee, which has been studying whether there is a need for any federal rule or rules governing attorney conduct in federal courts, has reached the stage of presenting options and draft rules to the various advisory committees and requesting feedback from them, both on the options and the drafts themselves. The materials and draft rules were prepared by Professor Daniel R. Coquillette, Reporter to the Standing Committee. Professor Resnick said the Standing Committee recognizes that bankruptcy proceedings represent a special situation, due in part to the fact that the Bankruptcy Code prescribes a standard for conflicts, and that the Standing Committee is prepared to consider separate rules for bankruptcy. The various alternatives presented center around Professor Coquillette's draft "core" rules. One is to take draft Rule 1, which states explicitly that the rules of the state in which the court is located govern an attorney's conduct in a federal matter. (All details would be left to the various state rules.) A second alternative would be to recommend adoption of Rule 1 plus the additional substantive Rules 2 - 10. Professor Resnick noted that bankruptcy proceedings are carved out of the reach of Rules 2 - 10 in subdivision (c) of Rule 1, so that the Advisory Committee would be free to adapt draft Rules 2 - 10 as necessary or draft entirely new rules of its own.

Concerning the draft rules, a member commented that draft Rule 2 might be acceptable, although the Weintraub[1] case says a trustee can waive a debtor's attorney-client privilege. Draft Rule 3, concerning conflicts, presents deeper problems, a member said, because under its terms an attorney for a debtor in possession could represent an adverse party just by obtaining consent, which would be a violation of the Bankruptcy Code. A possible solution might be to add language stating the rule applies except when it would conflict or be inconsistent with the statute. Draft Rule 4, which covers business transactions by an attorney, also would need to be changed, because 18 U.S.C. § 154 forbids officers of a bankruptcy estate from purchasing property of an estate and offers no "reasonable transaction" exception. The Chairman said the Standing Committee wants a broad response on whether any rules are needed on this subject and , if so, whether the rules should resemble the proposed drafts. In an initial poll, 3 members favored no federal rules on attorney conduct, 7 members favored adopting Rule 1, with an explicit exception for any inconsistency with the Code or other federal law, and 2 favored adopting the full series of "core" rules, with appropriate exceptions for bankruptcy.

A question was raised whether bankruptcy should have its own rules. The Chairman said he doubted people would accept the idea that bankruptcy has different rules. Appropriate exceptions, he believes, would be alright, but not different rules. Judge Robreno said, if a "core"

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[1]Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985).

rule is so important as to displace a state rule, why is bankruptcy different. Mr. Smith said one reason is that there is no definition of an adverse interest. For example, he said, to whom does the attorney for a debtor in possession owe the fiduciary duty: the estate, the corporation, the creditors? Appropriate rules for bankruptcy could fit into Professor Coquillette's framework, he said, but would displace the draft rules, at least to some extent. Mr. Foltz suggested that one approach might be to have different rules for the general counsel for a debtor in possession than for a special counsel. He noted that the client changes over time and cited as an example the fact that under state ethical rules, the attorney cannot use client confidences learned before filing against that now former client; yet the Bankruptcy Code requires the attorney for the debtor in possession to act in the interest of the estate. He suggested drafting bankruptcy rules and then working to convince the states to adopt them. **The consensus was to report to the Standing Committee that the Advisory Committee supports the concept of draft Rule 1 with an exception to the applicability of state rules when they are inconsistent with bankruptcy statutes. In addition, the Advisory Committee would not oppose the "core" federal rules approach (draft Rules 2 - 10) for the civil rules. If that approach is followed, however, more comprehensive study and drafting would be necessary to formulate "core" bankruptcy rules. Such an effort would be a long term project, probably requiring at least three years to complete.**

Notice to Governmental Units

The Reporter reviewed the Committee's actions at the September 1997 meeting by which the Committee had approved amendments to Rule 2002(j) that would require that the particular department, agency, or instrumentality of the United States through which a debt is owed to the federal government be identified in the address of the notice that must be sent to the United States Attorney. Proposed amendments to Rules 1007 and 5003 had been referred back to the subcommittee on government noticing. The chairman of the subcommittee, Judge Small, reviewed the new draft and described the changes made since the September 1997 meeting.

In Rule 5003, the changes related to the registry of addresses to be maintained by the clerk. They would require the clerk to update the registry annually, limit an agency to a single address but give the clerk the option to include more than one address, and provide a safe harbor if the registry address were not used, which the Reporter was to draft by tracking as closely as possible the language of § 523(a)(3) of the Code. In tracking § 523 (a)(3), lines 20 -24 of the draft rule extend safe harbor protection to a debtor that used a different mailing address if the governmental unit had notice or actual knowledge of the case or proceeding in time to participate in it. Mr. Kohn, who had circulated a memorandum dated February 2, 1998, to the subcommittee opposing the safe harbor provision, reiterated his objections. He suggested that Rule 5003 should provide a safe harbor only if the registry address is used and that similar proposed amendments to Rule 1007 should not be forwarded. The Reporter suggested as an alternative, changing line 21 of proposed Rule 5003 to say that failure to use the registry address "does not invalidate any notice that is otherwise effective under applicable law," leaving out any mention of actual knowledge. Professor Klee said he thought the concept of actual knowledge in time to

protect the government's rights should stay in the rule. Mr. Kohn said there are decisions in many circuits saying knowledge of the existence of a bankruptcy case is not enough, that a creditor has no obligation to monitor a case continuously, and that due process requires that the creditor receive specific notice of important events such as the claims bar date, which in chapter 11 is not provided by rule but must be set by the court. **A motion to adopt the draft as proposed by the subcommittee passed by a vote of 9 to 2. Mr. Heltzel said the clerk should be able to include in the registry a municipal governmental unit's address, at the clerk's option, and there was no opposition from the Committee to amending the Committee Note to accommodate this request.**

A member raised again the issue of knowledge by the government of the case or proceeding, and alternatives to the draft language were suggested. The Chairman said that using a different address could not invalidate a notice. Any notice that would suffice otherwise should suffice under the rule, he said. Alternatives again were suggested, including "but the failure to use the mailing address in the register does not invalidate the legal effect of any notice," and "but this paragraph does not preclude use of a different mailing address." **On a motion to reconsider the vote on this issue, there was no opposition to amending the draft starting at line 20 to say "but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law."** In conformity with this action concerning Rule 5003, **there was no opposition, with regard to Rule 1007, to changing the final sentence of proposed subdivision (m)(1) to "Failure to comply with this paragraph does not affect the debtor's legal rights." There also was no opposition to deleting proposed subdivision (m)(2) and conforming the Committee Note to the actions taken on the draft rule.**

The question of how to provide notice of potential imminent harm to public health or safety emanating from a debtor's property, together with proposed additional questions to the debtor's statement of financial affairs that are of interest to government agencies had been considered at the September 1997 meeting and referred to the subcommittee on forms. Mr. Sommer, the chairman of the subcommittee, first noted several corrections to the texts of the forms as printed in the agenda book.

Concerning the notice of imminent harm, Mr. Sommer recalled that the Committee had been troubled that placing the information in the statement of financial affairs and then requiring that portion of the statement to be sent to certain government agencies might require an enabling rule change. Accordingly, at the suggestion of the Reporter, the subcommittee now proposed to amend the voluntary petition by adding an "Exhibit C" checkbox to the form and an exhibit to be filed if any imminent danger needed to be reported. Professor Klee expressed concern about Fifth Amendment implications if a debtor's statement might be incriminating. Mr. Sommer said the subcommittee had not discussed the issue, but it seemed no different to him than the debtor's schedules. As with any other matter in a case, he said, a debtor could refuse to answer and let the court treat the matter as it would under § 344 of the Code. Judge Gettleman said he did not view "Exhibit C" as incriminating and believed the question would be a fairly innocent one for almost anyone. **The Committee approved the proposed amendments to the voluntary petition**

(Form 1) and the proposed new "Exhibit C" without opposition.

With respect to the statement of financial affairs, Mr. Sommer said, the subcommittee had considered five new questions and, in the course of addressing them, had amended current question 16 and moved it, and had amended the instructions concerning the obligation to complete the "business questions" portion of the form. Question 16, which asks whether the debtor is or has been "in business," would become question 17 and be answered by every debtor and would cover the full six years prior to filing rather than only two years. The instructions also would be amended to require a debtor to complete the business questions if the debtor is or had been in business, as defined in the form, during the six years prior to filing. Mr. Sommer noted that some of the business questions request information covering six years, and the changes described would assure that all debtors that would be required to answer any question in the business section of the form would know they need to complete it. One of the new questions would be added as (new) question 16 and would address community property owned by a debtor and a nonfiling spouse or former spouse. The subcommittee had approved the question in part but had reserved for consideration by the full Committee the issue of whether a debtor should be required to disclose the Social Security number of a nonfiling spouse or former spouse. Mr. Kohn said a nonfiling spouse's name may change over time and the Social Security number is, therefore, important to creditors of the marital community. Of the remaining questions and amendments as proposed by the subcommittee, Mr. Sommer indicated that questions 17 - 22 were simply renumbered and that questions 16 and 23 - 25 were new. He noted that question 25, which requires various disclosures concerning environmental matters, contains no time limits. **The Committee disapproved requiring disclosure of the Social Security number of a nonfiling spouse in proposed question 16 of the statement of financial affairs (Form 7), but otherwise approved, without opposition, the proposed amendments to the form.**

Mr. Sommer observed that when proposed amendments are published, judges and practitioners tend to comment on the entire form rather than just the portions to be amended. He asked if the Committee would want the forms subcommittee to consider the rest of the statement of financial affairs for possible amendments prior to publication. The Reporter said that the proposed amendments to the forms are part of the larger government noticing package of amendments to the rules and forms. He said there would not be time to consider amendments to the rest of the form before the June 1998 meeting of the Standing Committee and that allowing time for that consideration would, therefore, delay the government noticing package. **The Committee directed that only the amended questions and new questions be published.** For the **new questions, the Committee directed the inserting of a signal such as, "The following question is new,"** rather than using the underline/strikeout format, which would result in the underlining of the entire question.

National Bankruptcy Review Commission Report

The Reporter observed that most of the recommendations that relate to rules involve proposals that would implement recommended amendments to the Code. Until and unless

Congress enacts the legislation, it would be inappropriate for the Committee to propose rules, he said. **The Committee agreed.** Accordingly, the Committee considered only those recommendations that could be characterized as "stand alone" recommendations, those which do not require legislation. In addition, Judge Robreno noted that the Commission's recommendations are not the mandate of Congress and that the Commission itself was deeply divided on many of the recommendations.

The Commission recommended further amending Rule 9011 to require an attorney to make a reasonable inquiry into the accuracy of the information in the debtor's schedules, statement of affairs, lists, and amendments thereto. Judge Tashima noted that this would only make explicit what many think already is implicit in the rule. A member said any amendment should avoid turning a "reasonable inquiry" into an audit of the debtor by the attorney. **The Committee agreed to consider amending Rule 9011 in the manner recommended by the Commission at the Committee's next meeting.**

The consensus was that the Commission's recommendation that an official form be created for a motion for approval of a reaffirmation agreement was a good one and referred the matter to the forms subcommittee.

Concerning the recommendation that a creditor who does not receive notice of the bankruptcy should be afforded an extension of time to file an objection to the debtor's discharge or to seek revocation of the discharge, the consensus was to take no action.

With respect to the recommendation that the petition, list of largest creditors, and schedules of liabilities should require more specific disclosures concerning employee-related obligations, Mr. Sommer said the Committee could add more categories to the schedules but that the information mentioned by the Commission is required under the current schedules. **The consensus was to take no action on this recommendation.**

The Commission recommended amending Rule 2004(a) to include examiners among those who may seek an order authorizing an examination under the rule. The Reporter stated that an examiner usually is appointed for cause and charged with investigating or examining specific matters, while Rule 2004(b) is a "fishing expedition" authorized by a court order. Mr. Batson said an examiner occasionally may need an order to do the job, and Professor Tabb said the authority to issue an appropriate order appears to exist under S 105 of the Code. **The consensus was that no amendment is necessary, but that the Reporter should monitor the cases and bring the issue to the Committee if future developments warrant.**

The Commission recommended that an attorney's admission to practice in one bankruptcy court should entitle the attorney to practice in any bankruptcy court without the need for any other admission procedure. Some members thought the Committee could consider this proposal, and whether the bankruptcy rules have the authority to address the matter, as part of the work on the proposals for governing attorney conduct. Others said the subject really could be

addressed only by the district courts. **The consensus was to take no action.**

The Commission also recommended in the section of its report titled "Taxation and the Bankruptcy Code," that notice to governmental units be improved and that a registry of addresses of governmental units be established and maintained by each bankruptcy clerk. The Committee noted that it already had approved publication of proposed amendments to implement both recommendations.

Rules 4003(b) and 1017(e)(1)

Rule 4003(b). The Reporter stated that the amendment's purpose is to permit an extension of time in which to file an objection to a debtor's claim of exemption when a court does not rule on a timely filed motion to extend the time until after the original time for filing an objection has expired. **The Committee approved the Reporter's draft without objection.**

Rule 1017(e)(1). As a companion measure, the Reporter presented an amendment that would also permit a timely filed motion to extend the time to file a motion to dismiss a case under § 707(b) of the Code to be granted after the expiration of the original time to file such a motion. **The Committee approved the Reporter's draft without objection.** Judge Kressel suggested that Rule 4004(c) also should be amended to permit the court to withhold a debtor's discharge while a motion to extend the time for filing a motion to dismiss the case under § 707(b) is pending. **The Reporter agreed to add the suggested amendment to Rule 4004(c).**

Rule 2002(g)

Proposed amendments to this rule were approved by the Advisory Committee in 1997. The Reporter stated that Mr. Rosen, who was unable to attend the meeting but had reviewed the materials, believed the rule to be ambiguous and had suggested changing the order of the sentences, to make it clear that the address in the last-filed document should be used. Professor Klee, although not objecting to changing the order of the sentences, said doing so would not cure the problem if the proof of claim happened to be the first-filed document. Mr. Heltzel said he always would prefer that a separate document be filed for an address change. He said the clerk's office procedure with a proof of claim is to enter the address shown and run a matching program in the computer. If the address is a duplicate, the program will throw out one; if the address is different, the program will retain both and the creditor may receive two notices. As a practical matter, he said, the effect is that the latest address is used. **The Reporter suggested withdrawing this subdivision from the package of rules to be submitted to the Standing Committee with a request for publication and considering revised proposals for amendment at the next meeting. The Committee agreed.** (Other proposed amendments to Rule 2002, however, will go forward.)

Rule 9022

Mr. Heltzel raised his proposal, set forth in a letter to the Reporter dated July 14, 1997, to authorize the court to direct a person other than the clerk to serve notice of the entry of a judgment or order. Mr. Heltzel said he recognized the possible incentive for delay and prejudice to the other party when the appeal time is only ten days. He noted, however, that the person directed to give notice also must file a certificate of service, thus putting any delay in the record, and that the losing party also can monitor the docketing of the order by checking the court's PACER service. Judge Kressel opposed the amendment, because of the prejudice that could result from any delay. Judge Duplantier said that departing from the procedure specified in the civil rules would raise questions among the members of the Standing Committee. **The Committee declined to take any action to amend the rule.**

Rule 9009

The Committee discussed whether Rule 9009 should be amended to remove from the court and the parties the ability to make "alterations as may be appropriate" to the official forms in light of the delay in implementing the amended § 341 notice forms (Official Forms 9A-9I) caused by changes requested by individual courts. A member said some forms, such as the ballot and various other notices used in chapter 11 cases, are intended to be changed as required in every case. It also had appeared, after investigation into the current delays at the Bankruptcy Noticing Center, that the changes being requested are appropriate and that the problem resulted primarily from inadequate planning on the part of the noticing center. Accordingly, **the Committee took no action.**

Official Forms

Ms. Channon reported that the Schedule of Creditors Holding Unsecured Priority Claims (Form 6E) and the Proof of Claim (Form 10) are scheduled to be automatically amended to reflect automatic adjustments to certain dollar amounts in the Bankruptcy Code which appear in those forms. The forms showing the new dollar amounts had been distributed to the courts, to automation staff, and to publishers and software vendors. Recipients of the new forms had commented that the language on the forms stating that the dollar amounts "are subject to adjustment on 4/1/98 and every 3 years thereafter" is very confusing now that the first adjustment has been made. It is unclear, the commentators said, whether the new amounts include the 4/1/98 adjustment. **The consensus was that the language should be clear and that clarity could be achieved by considering the date as part of the automatic adjustment process, so that the date could change with the dollar amounts every three years.**

Technology Developments

Professor Resnick reported that the Standing Committee had established a technology subcommittee with Gene W. Lafitte, Esq., as chairman, representatives from all of the advisory committees, and with the reporters to the advisory committees as *ex officio* representatives. From the Advisory Committee on Bankruptcy Rules, the designated member is Judge Cristol,

and Mr. Heltzel has been appointed a consultant. The role of the new subcommittee is to monitor technological developments and ensure that any amendments to rules that are needed to facilitate appropriate use of technology in court proceedings can be coordinated among all the bodies of federal rules. Ms. Channon reported that five bankruptcy courts now accept electronic filings: the Southern District of New York, the Eastern District of Virginia (Alexandria Division), the Northern District of Georgia, the District of Arizona, and the Southern District of California.

Alternative Dispute Resolution (ADR)

Professor Tabb, who chairs the ADR subcommittee, announced that the final draft of the study of ADR activities in bankruptcy courts by the Federal Judicial Center has been completed. The subcommittee, however, had not had time to consider it and evaluate whether rules amendments should be proposed. Mr. Niemic, who directed the study and drafted the report, said that 31 courts now are engaged in ADR programs. He said the problems identified in the study were confidentiality, which scored higher as a problem for parties than for mediators, and having a mediator who was not disinterested. The bankruptcy estate paid the mediator's fee in 21 percent of the matters referred, and mediators played a role in plan development in nine percent of matters referred. Confidentiality was a problem both when confidential information was disclosed and when the failure to disclose information prevented the judge from knowing something the judge needed to know about the case. Professor Tabb noted that Congress may act on the ADR recommendations made by the National Bankruptcy Review Commission, which would affect any proposals that might be made by the ADR subcommittee.

Subcommittees

The Chairman suggested that two subcommittees appear to have fulfilled their purpose and could be discharged, the local rules subcommittee and the Rule 2004 subcommittee. **The consensus was to discharge both subcommittees.** Judge Cordova said that if the issue of whether to permit an examiner to request an examination under Rule 2004 begins to generate conflicting case law, the subcommittee might need to be reestablished. He also indicated that he would be willing to serve as chairman if the subcommittee were needed again.

Meeting Dates

The Committee chose January 29, 1999, as the date for a public hearing on the amendments being submitted with a request for publication. The hearing would be held in Washington and could be extended to January 30, if there are too many witnesses to be heard in one day. The Committee also selected March 18 -19, 1999, as the dates for its next spring meeting. The probable location for the meeting will be the Airlie Conference Center near Warrenton, VA. The Committee also decided to request that the public comment period close on February 1, 1999, to allow sufficient time to review what the Committee expects will be a large number of written comments.

Recognition

Ms. Wiggins thanked Judge Kressel and Professor Klee for reviewing the material prepared by the Federal Judicial Center for a computer-assisted learning program on the bankruptcy rules for use by deputy clerks in bankruptcy courts. She said both members had contributed many hours of time to the project, which now has been completed.

Respectfully submitted,

Patricia S. Channon

Item 7A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CHAIRS OF ADVISORY COMMITTEES

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CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

To: Honorable Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure

From: Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules

Date: May 18, 1998

Re: Report of the Advisory Committee on Civil Rules

I Introduction

The Advisory Committee on Civil Rules met at the Duke University School of Law on March 16 and 17, 1998. The Committee's deliberations focused in large part on proposals to amend the discovery rules. These proposals are set out in the Part II recommendations for action with the request that this Committee approve publication of the proposals for comment. Publication also is recommended for changes in Civil Rules 4 and 12 to provide for service on the United States and 60 days to answer in an action brought against a federal officer or employee in an individual capacity. Technical conforming amendments are recommended in Civil Rule 6(b) and Form 2. Part III describes many other activities of the Advisory Committee for information.

II ACTION ITEMS

Rules Proposed for Publication

Discovery Rules

When I assumed responsibilities as Chair of the Civil Rules Advisory Committee, existing proposals for change to the discovery rules had been pending for years. The American Bar Association had suggested narrowing the scope of discovery in the 1970s and this proposal to change Rule 26 has been the centerpiece of a more recent proposal by the American College of Trial Lawyers. Also, members of Congress had been pressing the Committee to make changes to the protective order rule. And finally, complaints persisted about the overall cost of discovery. In addition, the Committee was beginning to receive the results from its 1993 experimental changes to authorize local courts to require mandatory disclosure. To focus a project on these discovery proposals and to attempt to put all open items to rest, I posed the following questions to the Committee:

1. When fully used, is the discovery process too expensive for what it contributes to the dispute resolution process?

2. Are there rule changes that can be made which might reduce the cost and delay of discovery without undermining a policy of full disclosure?

3. Should the federal rules for discovery, applying to cases involving national substantive law and procedure, be made uniform throughout the United States?

In posing these questions, I did not intend that we again review the question of discovery abuse. Rather, I suggested that we undertake a look at and evaluate the architecture of discovery as it was designed.

A discovery subcommittee, chaired by Judge David F. Levi, was appointed, and Professor Richard L. Marcus was retained as Special Reporter. The subcommittee set to work immediately, establishing the framework for a conference that was held in January 1997 with a group of litigators drawn from a wide array of practice areas and locations. The views expressed at that conference helped shape the planning for a major conference held at Boston College Law School in September 1997.

The Boston College conference, to which we invited members of the academic community, the bench, the bar and various bar associations, was particularly successful. We invited responses and ideas from the major bar associations and received written responses from the American Bar Association Section of Litigation, the American College of Trial Lawyers, the American Trial Lawyers Association, the Defense Research Institute, the Trial Lawyers for Public Justice, and the Product Liability Advisory Council. At our request, the Federal Judicial Center conducted a survey of attorneys across the country about discovery, and we also asked the RAND Institute for Civil Justice to reevaluate its database collected in connection with its work under the Civil Justice Reform Act for information on discovery practice.

We learned from the Federal Judicial Center study, based on a survey of 2,000 attorneys to which it received 1,200 responses, that in average cases discovery costs represent about 50% of litigation expenses but that at the 95th percentile they constitute 90% of litigation costs. In high-discovery cases, these costs were higher for plaintiffs than for defendants. Of all types of discovery, depositions were the single greatest item of cost, costing nearly twice as much, on average, as document production.

The study also revealed that 83% of those responding wanted changes made to discovery rules, involving principally: (1) better access to judges; (2) greater uniformity of discovery rules; (3) greater sanctions for abuse; and (4) adoption of a code of civility. We heard from practitioners directly that depositions and document production presented the greatest costs.

After we received oral comments and papers from this wide group of rule users and students, the following matters about discovery emerged:

1. The desire for information in connection with the resolution of civil disputes was nearly universal. No one seemed to advocate the elimination of requiring full disclosure of relevant information.

2. Discovery is now working effectively and efficiently in a majority of the cases, which represent the "routine" cases.

3. In cases where discovery was actively used, it was frequently thought to be unnecessarily expensive and burdensome. Plaintiffs' lawyers seemed most concerned with the length, number, and cost of depositions, and defendants' lawyers seemed most concerned by the number of documents required in document production and the cost of selecting and producing them.

4. In districts where initial mandatory disclosure has been practiced, it is generally liked, and the users believe that it lessens the cost of litigation.

5. There was an overwhelming and emphatic support for national uniformity of the discovery rules, and almost all commentors favored the elimination of the local options afforded by Rule 26. There was substantial disagreement, however, on what the national rule should be.

6. The belief was almost universal that the cost of discovery disputes could be reduced by greater judicial involvement and that the earlier in the process that judges became involved, the better.

7. Many observed that the necessary strict observance of the attorney-client privilege, and the current principles defining how that privilege is waived, added substantial time to discovery compliance. Lawyers felt that a relaxation of the waiver rules for purposes of discovery would significantly lessen costs.

8. It was generally believed that discovery costs could be reduced without eroding full disclosure by adopting presumed limits on the length of depositions and on the scope of discovery, particularly in connection with the production of documents.

9. Early discovery cutoff dates and firm trial dates were recognized as the best court management tool to reduce the costs of discovery, and the RAND Institute data appears to have confirmed that conclusion.

The discovery subcommittee drew from the Boston College conference and from the studies conducted by the Federal Judicial Center and the RAND Institute to present a group of possible rule revisions and alternatives to the October 1997 Advisory Committee meeting. The Committee considered the options and provided instruction to the discovery subcommittee on various specific changes that it would like to consider.

Following the guidance of the Advisory Committee, the discovery subcommittee met in January 1998 to frame specific proposals and alternatives. These proposals were studied by the

Advisory Committee at its March 1998 meeting at Duke University and gave rise to the proposals now recommended for publication and public comment.

Before addressing the specific proposals, which are somewhat major, you should know that we have not proposed reducing the breadth of discovery, nor have we intended to undermine the policy of full and fair disclosure in litigation. Where we have narrowed the scope of attorney managed discovery, we have preserved the original scope under court supervision. Thus, you will note that under the proposed change, attorney-managed discovery is no longer allowed for all matters related to the "subject matter" of the litigation, but rather, it must be related to claims or defenses. We still permit judges, however, to afford discovery that reaches to the original scope. Similarly, while we have limited the length of depositions under attorney management, we have invited the attorneys to agree to longer depositions and we have authorized the courts to regulate their length.

Also, we have re-emphasized the policy — first announced in 1983, with the adoption of Rule 26(b)(2)'s proportionality provisions — that full disclosure does not require the production of all witnesses or of all documents. As we continue to adapt to this information age, the notion of having all information on a subject is almost unattainable. We are going to have to move increasingly to a notion that although disclosure must be fair and full it does not necessarily require that every copy of every document that relates to a particular proposition be produced. You only have to think about the amount of material on every desktop computer in a large corporation to visualize what that entails. This policy is manifested in our proposal to involve the court in the decision whether discovery should extend beyond the claims and defenses raised in the pleadings, and in our authorization to courts to require payment for duplicate and peripheral discovery.

And finally, we have tried to effect the changes in a manner that does not give an advantage to plaintiffs or defendants. During our conferences, we heard that plaintiffs were most concerned about the costs of depositions, and the defendants about the costs of producing documents. We have tried to adopt changes that give effect in a balanced way to both observations, leaving open the right of either side to have the broadest reasonable scope of discovery.

Moving to the specific changes, it will be useful first to summarize them and then provide a more detailed account.

First, Rule 5(d) is amended to provide that disclosures under Rules 26(a)(1) and (2), and discovery requests and responses, need not be filed until the discovery materials are used in the proceeding.

The initial disclosure procedure adopted as Rule 26(a)(1) in 1993 would be significantly limited. National uniformity is established by rescinding the portion that authorizes individual districts to opt out by local rule. The scope of the disclosure obligation is substantially reduced, however, so that it would require disclosure only of the identity of witnesses and documents that support the disclosing party's position. Even supporting information need not be disclosed if it is aimed solely at impeachment. Other changes are proposed in addition to these major changes. In part because local rules are now barred, the rule lists several categories of proceedings that are exempt from disclosure requirements. A party who believes that disclosure is not appropriate in the

circumstances of the action can secure a judicial determination by stating the objection in the Rule 26(f) report. Explicit provision is made for disclosure by late-added parties. And, to be consistent with the proposed Rule 5(d) amendments, the present Rule 26(a)(4) provision for filing all disclosures is moved to Rule 26(a)(3) and limited to pretrial disclosures under (a)(3).

The scope of discovery defined by Rule 26(b)(1) is retained, but divided to distinguish between attorney-managed and court-managed discovery. Attorney-managed discovery is limited to matters relevant to the claims or defenses of the parties. Discovery that reaches beyond the claims or defenses of the parties, embracing the "subject matter involved in the action," remains available, but only on court order for good cause. A less important change to subdivision (b)(1) emphasizes that information not admissible in evidence can be discovered only if relevant and reasonably calculated to lead to the discovery of admissible evidence. Finally, a new sentence is added as a reminder of the important limitations imposed by subdivision (b)(2).

Rule 26(b)(2) is changed to delete the authorization for local rules that change the presumptive national limits on the frequency or duration of discovery requests.

The Rule 26(d) discovery moratorium is amended to allow the parties to proceed immediately with discovery in cases categorically excluded from initial disclosure requirements by proposed Rule 26(a)(1)(E).

Rule 26(f) is amended to delete the authorization for local rules that exempt cases from its requirements. Its terminology is changed by referring to a "conference" rather than a "meeting". This change reflects concerns that face-to-face meetings, although highly desirable, may impose untoward burdens in districts that cover broad territories. The value of face-to-face meetings is recognized, however, by authorizing local rules that require meetings in some or all cases. The times for conferring and reporting are changed to ensure the court an adequate opportunity to consider the report before a scheduling conference.

Rule 30(d)(2) is changed by establishing a presumptive limit of "one day of seven hours" for a deposition. The presumptive limit can be changed by court order, or by a stipulation of the parties joined by the deponent. Paragraphs (d)(1) and (d)(3) are changed to make it clear that the limits on objections reach all objections by any person, and that sanctions may be imposed for any improper impediment or delay.

Rule 34(b) is amended to make explicit the power, now believed to be implicit in Rules 26(b)(2) and 26(c), to allow a party to pursue a discovery request that otherwise would violate the limits of Rule 26(b)(2) on condition that the requesting party pay part or all of the reasonable costs of responding.

Rule 37 now authorizes sanctions for failure to supplement disclosures under Rule 26(e)(1), but says nothing of failure to supplement discovery responses under Rule 26(e)(2). This omission would be cured by the proposal to add Rule 26(e)(2) to the rule.

As a final preliminary note, it should be explained that the Committee has made a deliberate decision not to attempt to restyle the subdivisions that would be changed by these proposed amendments. Discovery remains a controversial subject. The Committee believes that these

proposals are carefully calculated to maintain all of the useful effects of present discovery practice, and at the same time to reduce unnecessary costs. But it is important to focus public comment and testimony on the substance of the intended changes. To couple general style revision with these changes would be to incite suspicions about the purposes of the style revisions and to diffuse comments.

Disclosure

National Uniformity. Rule 26(a)(1), first added in 1993, permitted local defection by local rule. This express invitation to disuniform practice arose from a two-fold concern for experiments under the Civil Justice Reform Act. In part, the Committee was moved by the fact that some districts had adopted local rules modeled on the first proposal published by the Committee; it was anxious not to defeat this reliance by adopting a different national rule, even as it believed that the first proposal must be improved before adoption as a national rule. And in part, the Committee believed that local experimentation might provide valuable information for future refinements of disclosure practice.

However good these motives were, the wide disparities of practice from district to district have been found undesirable for several reasons. One set of reasons is practical. There are increasing numbers of lawyers who practice in different districts, and many clients who have litigation in several districts. Attorneys find it confusing to shift from one system to another. Clients are even more baffled by the different obligations they encounter. The other set of reasons is more conceptual. There is a strong belief that the Enabling Act contemplates a uniform national procedure. This belief allies with an increasing concern that local rules have proliferated on a variety of subjects, undesirably diluting the values of uniform federal procedure.

There is another consequence of local autonomy. It entrenches local folkways and increases resistance to "outside" interference. The longer local rules are allowed to persist, the more difficult it will be to restore any semblance of national uniformity. The taste of independence provided by local rules also seems at times to encourage adoption of practices that are not consistent with the national rules. Expert-witness disclosure under Rule 26(a)(2) and pretrial disclosure under Rule 26(a)(3) provide illustrations. Although these paragraphs do not authorize departure by local rule, the most recent Federal Judicial Center study of disclosure practices shows that a dozen districts have opted out of these disclosure requirements. See D. Stienstra, *Implementation of Disclosure in United States District Courts* 5 (FJC March 30, 1998).

Given these concerns and constraints, the Committee chose not to attempt any judgment on the desirability of Rule 26(a)(1) as it now stands. After a period of some uncertainty as to just what was being said, the RAND study of CJRA plans found too little experience with the brand-new Rule 26(a)(1) to reach any conclusions as to its effects. The FJC study of discovery suggests that Rule 26(a)(1) disclosure most often is neutral, but that when it has effects they are those that the Committee intended — reductions in cost and delay, support for earlier settlement, and better trials. Some districts that have adhered to 26(a)(1) seem pleased with the results. These findings are suggestive, but by no means conclusive.

Set against this course is the concern that local variations should not be endured any longer than necessary. Remembering the controversy that swirled around Rule 26(a)(1) — and particularly

remembering that it became effective only because Congress ran out of time to reject it — the Committee concluded that it is better to propose a less controversial rule for national uniformity. The beginning was a strong disclosure rule that could be, and was, defeated by local option. The next step is a diluted disclosure rule that cannot be defeated by local option. Perhaps in several more years the time will come for a strong disclosure rule that cannot be defeated by local option.

Supporting information. Rule 26(a)(1)(A) and (B) now require disclosure of the identity of witnesses and documents likely to have information relevant to disputed facts alleged with particularity in the pleadings. The proposed amendment narrows the obligation to information that supports the disclosing party's "claims or defenses, unless solely for impeachment." The change would mean that a party need no longer do an adversary's work, nor guess what are the "disputed facts alleged with particularity in the pleadings." Instead a party need only figure out its own positions and disclose the identity of witnesses and documents that support those positions.

This proposal responds to one of the fundamental objections that has been addressed to current initial disclosure practice. Opposition to present Rule 26(a)(1) draws great force from the belief that one side should not be forced to work for the other side. A party who understands the litigation better than its adversary may, by disclosing the identity of witnesses and documents, reveal damaging theories of law or fact that, absent disclosure, would never be recognized by the adversary. Some proponents of broad disclosure believe that this is a desirable consequence. Others believe that it is a price to be paid for the benefit of "jump-starting" the discovery process by requiring disclosure of information that otherwise would inevitably be demanded in the first wave of any competent discovery program. Whatever the best long-term accommodation of these competing arguments may be, the better answer for the time being is clear. Initial disclosure remains highly controversial. The adversary system should not yet be qualified by disclosure to the extent of forcing the more sophisticated litigant to disclose even the mere identity of witnesses and documents that a less sophisticated adversary may not manage to uncover by discovery.

The Committee divided on a drafting question. As determined by the majority, the draft Rule 26(a)(1) refers to "supporting information." The alternative preferred by a few would refer to information that the disclosing party "may use to support its claims or defenses, unless solely for impeachment." It is anticipated that if these proposals are approved for publication, the letter inviting comments and testimony will ask for comments on this alternative drafting choice.

"Low-end" Exclusions. Proposed Rule 26(a)(1)(E) is an attempt to avoid the risk that disclosure may become an undesirable burden in cases that do not need it. The starting point is the simple fact that many federal cases have no discovery at all. A broad disclosure obligation of the sort embodied by present 26(a)(1) might satisfy the needs of discovery in some cases that now have discovery, at lower cost, but it also may impose unnecessary costs and delays in many cases that do not have discovery, do not need discovery, and will not benefit from disclosure.

Under present Rule 26(a)(1), local rules can exempt cases from disclosure requirements. Districts that have retained some form of disclosure have exempted a bewildering variety of cases — one district even has taken care to exempt "prize cases." The proposal to remove the local-rule option justifies an attempt to forge a national set of exemptions from the lessons of local experience.

Rule 26(a)(1)(E) in the draft lists ten separately itemized categories of proceedings that are exempt from initial disclosure and also from the Rule 26(f) conference. This proposal in particular is one that will benefit from public comments and testimony. One set of questions is obvious: are these cases properly excluded, and should others be added to the (already long) list? The other set may, alas, be equally obvious: how well are the categories described? If we can be reasonably confident of some descriptions — such as an action to enforce an arbitration award — we are obviously making a preliminary stab at other descriptions, such as "an action for review on an administrative record" or "an action by the United States to recover benefit payments."

"High-end Exclusion." At the other end of the litigation line lie cases that engender great volumes of discovery and that require — and usually receive — substantial judicial management. The Committee has heard from many observers that disclosure is not appropriate in these cases, and routinely is not practiced. No party will accept disclosures as a reason for diminishing in any way the sweep of discovery requests. It is better to get directly to the tasks of management and discovery.

Apart from the "big discovery" cases, it also may make sense to postpone disclosure pending disposition of preliminary motions. A strongly supported challenge to subject-matter or personal jurisdiction is an obvious illustration. So may be a powerful motion to dismiss for failure to state a claim. Allowing these motions to accomplish an automatic stay of disclosure, however, would be clearly undesirable. Too many motions are at best wishful, and too many more would be encouraged by the prospect of deferring disclosure and discovery.

These observations have been persuasive, but have not solved the drafting problem. It does not seem useful to draft a rule that exempts "big discovery" or "problem discovery" cases. The resolution, reflected in the final portion of Rule 26(a)(1), is to allow the parties to stipulate that there is to be no initial disclosure, or to allow any party to object during the Rule 26(f) conference that disclosure is not appropriate. The objection must be stated in the discovery plan, and stalls disclosure until the court decides what disclosure — "if any" — should be made. One purpose of this approach is to provide one spur for early judicial supervision of disclosure and discovery, the one remedy that commands more hope and respect from practicing lawyers than any other.

Late-added Parties. The final portion of proposed Rule 26(a)(1) also addresses a problem that appears on the face of the present rule. Nothing in the rule now addresses the initial disclosure obligations of parties added after the Rule 26(f) conference. After experimenting with a series of increasingly detailed drafts, the proposal takes a reasonably simple approach. "Any party first served or otherwise joined after" the 26(f) conference has 30 days to make initial disclosures.

Filing. The filing requirements for disclosures are changed by proposed Rules 26(a)(3) and (4), in conjunction with proposed Rule 5(d). Rule 26(a)(4) now requires that all disclosures be filed. This requirement would be deleted. Rule 5(d) provides that initial disclosures under Rule 26(a)(1) and expert witness disclosures under Rule 26(a)(2) need not be filed until they are used in the proceeding. Amended Rule 26(a)(3) would provide that pretrial disclosures must be promptly filed with the court. Pretrial disclosures may be helpful in final pretrial planning, and in any event must be filed because of the requirements that objections based on the disclosures must be made within the time set by Rule 26(a)(3).

Time. The final paragraph of Rule 26(a)(1) would change the time for disclosures from 10 days after the Rule 26(f) conference to 14 days after the conference. This change is integrated with proposed time changes in Rule 26(f) to ensure that the parties and the court have adequate opportunity to consider the disclosures and Rule 26(f) report before a scheduling conference or order is due.

Scope of Discovery: Rule 26(b)(1)

The American College of Trial Lawyers has revived, and urged on the Committee, a proposal first advanced in 1977 by a Section of Litigation Special Committee for the Study of Discovery Abuse. Although the proposal has been repeatedly considered and somewhat modified by the Advisory Committee over the years, this history of continued rejection does not carry the precedential weight that might seem appropriate. Instead, the Committee has attempted a variety of less sweeping approaches. Twenty years of failure to reduce worrisome discovery problems to tolerable levels may justify resort to stronger medicine. The current proposal to amend Rule 26(b)(1) adopts a reduced form of the initial proposal, but with one vitally important qualification. As reformulated, the proposal does not narrow the overall scope of discovery. Instead, it introduces a distinction between lawyer-managed discovery and court-managed discovery. The full sweep of discovery remains available, but the broader reaches require court supervision when the parties cannot agree.

Rule 26(b)(1) now defines the scope of discovery as matter "relevant to the subject matter involved in the pending action." The original Section of Litigation proposal was to limit the scope to "issues raised by the claims or defenses of any party." This has been softened to "matter relevant to the claim or defense of any party," without requiring clearly focused or identified issues.

At the same time as this presumptive limit is proposed, the court is given power to broaden discovery back to "any information relevant to the subject matter involved in the action." Only "good cause" need be shown. This structure is calculated to force judicial supervision of the problem cases that need judicial supervision. The scope of routine discovery is narrowed in some measure. The proposed Committee Note states that the court has authority to confine discovery to the pleadings, and that — without court permission — the parties are not entitled to discovery to develop new claims or defenses not identified in the pleadings. The parties of course can agree to broader discovery. The Rule 26(f) conference is one obvious occasion for forging agreements. But if the parties cannot agree, the court must resolve the dispute.

As thus developed, the Rule 26(b)(1) proposal is not an effort to narrow the scope of useful discovery. Instead it is an effort to change the balance between attorney-controlled discovery and court-controlled discovery. Time and again, lawyers have told the Committee that the one effective discovery reform will be to encourage trial judges to assert control. Judicial involvement is needed when there are legitimate disputes. It also is needed when one party is being unreasonable. All reasonably needed discovery will remain available.

Rule 26(b)(1) is changed in two additional respects. A new emphasis is added to the present final sentence. Discovery of information inadmissible at trial is retained, but it is emphasized that the information must be relevant. Although it is difficult to imagine that information not relevant to the parties' claims or defenses might be reasonably calculated to lead to the discovery of

admissible evidence, the new emphasis will stop up one possible argument for excessive inquiry. The second change adds an explicit reminder that all discovery is subject to the limitations imposed by Rule 26(b)(2). There is widespread feeling that at least some courts are not using as vigorously as should be the power to control excessive discovery established by subdivision (b)(2). The new reminder is intended to encourage more frequent consideration of the (b)(2) principles.

Local Rules: Rule 26(b)(2)

Rule 26(b)(2) now authorizes local rules that alter the national-rule limits on the numbers of depositions or interrogatories, and that set limits on the length of depositions. The proposed amendment removes this authorization. The Committee does not believe that variations in individual district practices, perhaps as influenced by local state practice, justify departure from the numbers of depositions and interrogatories set by Rules 30, 31, and 33. Proposed Rule 30(d)(2) would establish a national limit on the length of depositions, and again there is no apparent justification for allowing defeat of the national rule by local rules. Adjustment of these matters must be made by order in a specific case, not by local rule or "standing order." Authority to set local-rule limits on the number of Rule 36 requests for admissions is retained, however, because there are no limits in the national rules and a number of districts have adopted such local rules. (It may be noted that the Discovery Subcommittee and the Advisory Committee have discussed the possibility of adopting a quantitative limit on Rule 34 requests to produce. No workable means has been found to implement a limit. A numerical limit on the number of requests would jeopardize the Rule 34(b) requirement that requests be framed with "reasonable particularity." A numerical limit on the number of items produced would be nonsensical. A local rule that purported to establish such limits would be inconsistent with Rule 34.)

Discovery Moratorium: Rule 26(d)

As amended in 1993, Rule 26(d) as a general matter bars discovery before the parties have met as required by Rule 26(f). This moratorium continues to be desirable despite the narrowing of initial disclosure requirements. The moratorium not only ensures that disclosure is not superseded by earlier discovery, but — and perhaps more important — also preserves the rule of the Rule 26(f) conference as a discovery-planning event. The present rule grants authority is granted to change the moratorium by local rule. The proposed amendments delete the authority for local rules. In addition, the categories of proceedings exempted from initial disclosure by proposed Rule 26(a)(1)(E) are exempted from the discovery moratorium. It is expected that ordinarily there will be little or no discovery in these cases, but they are exempted from the moratorium because they are exempted also from the Rule 26(f) conference. This structure means that in theory a plaintiff could begin discovery immediately on filing an action, imposing disadvantages on a defendant who is obliged to respond within the ordinary discovery time limits. The Committee considered resurrection of the time provisions that, until 1993, granted defendants additional time to respond to discovery demands made at the initiation of an action. In the end, it was concluded that there is little need to further complicate the discovery rules for this purpose. If there are any cases in which a plaintiff seeks to take unfair advantage of this new opportunity, the courts have ample power to protect the defendant under Rule 26(c) and otherwise.

Rule 26(f) Conference

The proceedings exempted from initial disclosure by proposed Rule 26(a)(1)(E) are exempted also from the Rule 26(f) conference. These proceedings are not likely to benefit from a conference requirement because they are not likely to involve extensive discovery.

The times for the conference and the report are changed. The present rule sets the conference at 14 days before a scheduling conference is held or a scheduling order is due, and sets the time for the report at 10 days after the conference. Since Rule 6(a) excludes intermediate weekend days and holidays from the 10-day period, it is possible that the report will be due on the day of the scheduling conference or order. The proposed amendments set the conference at 21 days before the scheduling conference or order, and set the report at 14 days after the conference. Because the 14-day period is not extended under Rule 6(a), these changes ensure that the court and the parties will have adequate time to consider the disclosures and report.

Finally, the Rule 26(f) obligation to "meet" is changed to an obligation to "confer." This proposal reflects conflicting concerns. The Committee believes that the Rule 26(f) procedure has been the most successful of all the 1993 discovery amendments, and that its success is significantly enhanced by a face-to-face meeting. At the same time, however, it must be recognized that some districts cover great reaches of thinly populated territory. A face-to-face meeting requirement can impose undue burdens on the parties to ordinary litigation in such circumstances. These concerns were resolved by proposing to substitute a conference for a meeting, but also by authorizing local rules that require the parties or attorneys to attend the conference in person. Local rules seem suitable in this setting because there are clear local differences in geography. A local rule that requires personal attendance, but excuses personal attendance beyond a specified distance, would be consistent with this authorization.

Deposition Length

In 1991, the Committee published for comment a proposal to establish a 6-hour time limit for oral depositions. Although many of those who commented or testified agreed that ordinarily it should be possible to depose a witness in 6 hours, the proposed amendment was not sent forward for adoption. Complaints about unnecessarily prolonged depositions continue to be made, however, and the Committee has concluded that a presumptive limit should be established.

The Rule 30(d)(2) proposal adopts a presumptive limit of "one day of seven hours." The one-day limit was added because it was feared that a simple 7-hour limit might be subject to abuse by repeated convening and adjourning. Seven hours was chosen, recognizing the potential arbitrariness of any specific duration, as the measure of a reasonable working day. The sense that this protection should operate to protect the deponent as well as the parties is reflected in the requirement that the deponent join any stipulation to extend the period.

The court is authorized to change the time limit, and also to alter the "one day" presumption. A physician, for example, may prefer to practice medicine all day and tend to a deposition in the late afternoon or early evening hours. It may make sense to accommodate such needs by allowing the deposition to be scheduled for two or even more sessions. A similar course might be followed if

there are foreseeable reasons to explore preliminary matters first, followed by an interval for further investigation before concluding a deposition.

Other Rule 30(d) Changes

Other but modest changes are proposed for Rule 30(d). The first, in Rule 30(d)(1), makes it clear that all objections are covered, not only those that can be characterized as objections "to evidence." The second, also in Rule 30(d)(1), makes it clear that the limits on instructing a deponent not to answer apply to any person, not only to a party.

Rule 30(d)(2) is changed to make it clear that additional time can be allowed for a deposition when an impediment or delay arises from a "circumstance" as well as conduct of a deponent or other person. Examples might include mechanical failures, health problems, or the like.

The present final sentence of Rule 30(d)(2) is redesignated as Rule 30(d)(3), and changed to ensure that sanctions can be imposed for any impediment, delay, or other conduct that frustrates fair examination.

Cost-Bearing: Rule 34(b)

It is proposed to amend Rule 34(b) by adding a provision that recognizes the court's power to implement the limitations that Rule 26(b)(2) places on excessive discovery by conditioning discovery on payment by the requesting party of part or all of the reasonable expenses incurred by the responding party. The draft Committee Note states that this provision makes explicit a power that now is implicit in Rule 26(b)(2) and explicit in Rule 26(c). The reason for adding this explicit recognition to Rule 34(b) rather than to Rule 26(b)(2) is that protests about excessive document production demands continue to be the most regular and vehement source of discovery complaints. An effort has been made to draft the Note to make it clear that this explicit statement in Rule 34(b) is not intended to negate the use of cost-bearing orders with respect to excessive uses of other discovery methods, including expensive depositions that may place untoward financial burdens on parties with few resources for litigation.

The Note also makes it clear that cost-bearing is not a routine measure to be used in every case. The Committee has been advised by many lawyers that Rule 26(b)(2) has not always fulfilled its promise as an effective restraint on discovery excesses. There has been no hint that Rule 26(b)(2) has been used with excessive enthusiasm. There is little reason to fear that courts will be infected with a sudden desire to redistribute the expenses of complying with reasonable discovery requests. At the same time, it does not seem appropriate to limit cost-bearing orders to "extraordinary" or "massive discovery" cases. Expensive or largely redundant discovery may be disproportionate to the needs of modest cases even if the discovery itself would be clearly appropriate in larger-scale litigation. The guides of Rule 26(b)(2)(i), (ii), and (iii) are sufficient.

Cost-bearing is likely to be faced in one of two procedural settings. In the first, the party resisting discovery may move for a Rule 26(c) protective order; cost-bearing may be an appropriate response, even if the requested relief is an outright denial of discovery. In the second, the party seeking discovery may move to compel discovery under Rule 37(a); it is expected that the party resisting discovery will have raised the Rule 26(b)(2) objection in response to the discovery request,

and the cost-bearing issue will be framed naturally. Both Rules 26(c) and 37(a) require that before making a motion the moving party confer, or attempt to confer, with the opposing party; the conference should be a fruitful occasion for resolving these matters on a pragmatic basis.

The Discovery Subcommittee originally proposed that cost-bearing be added to Rule 26(b)(2) rather than Rule 34(b). This question continues to stir differences of opinion. It is anticipated that if these proposals are approved for publication, the letter inviting public comment and testimony will identify this question as an issue for comment.

Failure To Supplement Discovery Responses

Rule 37(c)(1) now provides sanctions for failure to supplement disclosures, but does not provide sanctions for failure to supplement discovery responses. It is proposed to add Rule 26(e)(2) to Rule 37(c)(1), so that there is a clear sanction provision for failure to discharge the duty to supplement discovery responses.

Filing Discovery Materials

Rule 5(d) provides that the court may order that discovery materials not be filed "unless on order of the court or for use in the proceeding." A majority of the districts have adopted local rules that prohibit filing. The Local Rules Project concluded in 1989 that these local rules are invalid, but urged the Advisory Committee to consider amending Rule 5(d). Again in 1997, the Judicial Conference of the Ninth Circuit found many of these local rules, concluded with regret that they are invalid, but urged the Advisory Committee to amend Rule 5(d). In responding to this advice, the Advisory Committee concluded that there is no apparent reason for adopting different filing requirements for different districts. Even if some districts vary in their present capacities to receive filing, there is little reason to take these conditions as a permanent feature that must be recognized for all time.

If local rules are not the best answer, the collective wisdom reflected in so many local rules strongly supports the conclusion that routine filing of all discovery materials is inappropriate. Filing adds burdens and expenses not only on the courts but also on the parties. Some portion of discovery materials — probably a large portion in many cases — is never used for any purpose. There are indications that even in districts that do not have local rules barring filing, nonfiling is a routine habit with many attorneys.

It is proposed to amend Rule 5(d) to provide that Rule 26(a)(1) and (2) disclosures, and Rule 30, 31, 33, 34, and 36 discovery materials "need not be filed until they are used in the proceeding or the court orders filing." Any use of discovery materials will require filing of the materials used — the most common illustrations will be uses to support motions, including summary-judgment motions, or use at trial. The filing requirement is limited to the materials used, although the court may order filing of additional materials to support its deliberations or to ensure public access to information of interest to the public. A party who wishes to file discovery materials, moreover, may file them without awaiting either a court order or use in the proceeding. This permission to file will enhance the opportunity for public access in districts that now prohibit filing by local rule, so long as there is no protective order limiting or barring access.

Pending Discovery Questions

The Discovery Subcommittee has not been discharged. It has been asked to continue to study additional proposals. One of these proposals is that a presumptive time limit be adopted for document requests. One form of the limit would be that good cause need be shown to win production of documents created more than seven years before the events giving rise to the claims or defenses in the action. Another proposal is that pattern discovery requests be developed for use in specific types of litigation. A pilot project has been launched by two experienced antitrust attorneys to attempt to develop a pattern acceptable to plaintiffs and defendants. If this approach proves feasible, the Committee will consider the best means of pursuing it.

The problems arising from discovery of electronically stored and retrieved information are acute, and are evolving at a dizzying pace. These questions have been committed to the Technology Subcommittee to hold for future consideration when there may be a reasonable foundation for advancing responsible recommendations.

Discovery Changes Passed By

The Advisory Committee has concluded that no need has been shown to revise Rule 26(c) to ensure public access to discovery information that may bear on public health or safety. Despite frequent anecdotes of injuries that might have been prevented by earlier public access to discovery information hidden by protective orders, no persuasive showing has been made that actual current practice supports the anecdotes. The earlier-published proposal to amend Rule 26(c) to emphasize the present power to modify or vacate a protective order has been removed from the Committee agenda.

The question of a presumptive cutoff time was debated by the Committee at length, with advice from the Discovery Subcommittee. It is clear that Rule 16 establishes full authority to order discovery time limits, and many courts exercise this authority on a regular basis. The question is whether Rule 16 should be amended to specify a particular, if only presumptive, time for concluding discovery. The purpose of the amendment would be to force all courts to adopt the good practices followed in most courts. Although this purpose may be desirable, it runs up against the conclusion that district dockets vary too widely to permit a national rule that sets a presumptive trial date for civil cases. Without a presumptive trial date, a presumptive discovery cut-off could be worse than pointless — in some cases, at least, it would require unnecessary early work and distort the trial preparation process. With some regret, the Committee concluded that it is not possible to recommend further national rulemaking on this topic.

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE*

Rule 5. Service and Filing Pleadings and Other Papers

* * * * *

(d) Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses need not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission~~the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding~~.

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* New matter is underlined; matter to be omitted is lined through.

COMMITTEE NOTE

Subdivision (d). Rule 5(d) is amended to provide that disclosure under Rule 26(a)(1) and (2), and discovery requests and responses under Rules 30, 31, 33, 34, and 36 need not be filed until they are used in the action. "Discovery requests" includes deposition notices and "discovery responses" includes objections. The rule supersedes and invalidates local rules that forbid or require filing of these materials before they are used in the action. The former Rule 26(a)(4) requirement that disclosures under Rule 26(a)(1) and (2) be filed has been removed. Disclosures under Rule 26(a)(3), however, must be promptly filed as provided in Rule 26(a)(3). Filings in connection with Rule 35 examinations, which involve a motion proceeding when the parties do not agree, are unaffected by these amendments.

Recognizing the costs imposed on parties and courts by required filing of discovery materials that are never used in an action, Rule 5(d) was amended in 1980 to authorize court orders that excuse filing. Since then, many districts have adopted local rules that excuse or forbid filing. In 1989 the Judicial Conference Local Rules Project concluded that these local rules were inconsistent with Rule 5(d), but urged the Advisory Committee to consider amending the rule. Local Rules Project at 92 (1989). The Judicial Conference of the Ninth Circuit gave the Committee similar advice in 1997. The reality of nonfiling reflected in these local rules has even been assumed in drafting the national rules. In 1993, Rule 30(f)(1) was amended to direct that the officer presiding at a deposition file it with the court or send it to the attorney who arranged for the transcript or recording. The Committee Note explained that this alternative to filing was designed for "courts which direct that depositions not be automatically filed."

Although this amendment is based on widespread experience with local rules, and confirms the results directed by these local rules, it is designed to supersede and invalidate local rules. There is no apparent reason to have different filing rules in different districts. Even if districts vary in present capacities to store filed materials that are not used in an action, there is little reason to continue expending court resources for this purpose. These costs and burdens would likely grow as parties make increased use of audio- and videotaped depositions. Equipment to facilitate review and reproduction of such discovery materials may prove costly to acquire, maintain, and operate.

When the rule was amended in 1980, there was concern about access to discovery materials. The widespread adoption of local rules - sometimes forbidding, not just excusing, filing - raises doubts about the ongoing importance of filing as a means of access to discovery materials. Unlike some local rules, Rule 5(d) permits any party to file discovery materials if it so chooses (subject to the provisions of any applicable protective order), thus potentially facilitating access. In addition, the court may order filing.

The amended rule provides that discovery materials and disclosures under Rule 26(a)(1) and (a)(2) need not be filed until they are "used in the proceeding." This phrase is meant to refer to proceedings in court. Accordingly, "use" of discovery materials such as documents in other discovery activities, such as depositions, would not trigger the filing requirement. In connection with proceedings in court, however, the rule is to be interpreted broadly; any use of discovery materials in court in connection with a motion, a pretrial conference under Rule 16, or otherwise, should be interpreted as use in the proceeding.

Once discovery or disclosure materials are used in the proceeding, the filing requirements of Rule 5(d) should apply to them. But because the filing requirement applies only with regard to materials that are used, only those parts of voluminous materials that are actually used need be filed. Any party would be free to file other pertinent portions of materials that are so used. See Fed. R. Evid. 106; cf. Rule 32(a)(4). If the parties are unduly sparing in their submissions, the court may order further filings. By local rule, a court could provide appropriate direction regarding the filing of discovery materials, such as depositions, that are used in proceedings.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except in categories of proceedings specified in subparagraph (E), or to

the extent otherwise stipulated or directed by order ~~or local rule~~, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment~~relevant to disputed facts alleged with particularity in the pleadings~~, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that support its claims or defenses, unless solely for impeachment~~that are relevant to disputed facts alleged with particularity in the pleadings~~;

(C) a computation of any category of damages claimed by the disclosing party, making

available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(E) The following categories of proceedings are exempt from initial disclosure under paragraph (1): (i) a proceeding withdrawn under Title 28, U.S.C. § 157(d) from reference to a bankruptcy judge; (ii) a bankruptcy appeal; (iii) an action for review on an administrative record; (iv) a petition for habeas corpus or other proceeding to

challenge a criminal conviction or sentence; (v) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision; (vi) an action to enforce or quash an administrative summons or subpoena; (vii) an action by the United States to recover benefit payments; (viii) an action by the United States to collect on a student loan guaranteed by the United States; (ix) a proceeding ancillary to proceedings in other courts; and (x) an action to enforce an arbitration award.

~~Unless otherwise stipulated or directed by the court,~~ T~~t~~hese disclosures must~~shall~~ be made at or within 14~~10~~ days after the subdivision (f) conference~~meeting of the parties under subdivision (f).~~ unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the subdivision (f) discovery plan. In ruling on the objection, the

court must determine what disclosures - if any - are to be made, and set the time for disclosure. Any party first served or otherwise joined after the subdivision (f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party mustshall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

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(3) Pretrial Disclosures. In addition to the disclosures required by Rule 26(a)(1) and (2)in the preceding paragraphs, a party shall provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly

file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures~~; Filing~~. Unless the court orders otherwise~~ directed by order or local rule~~, all disclosures under paragraphs (1) through (3) must~~shall~~ be made in writing, signed, and served.~~, and promptly filed with the court.~~

* * * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that~~which~~ is

relevant to ~~the subject matter involved in the pending action, whether it relates to~~ the claim or defense of ~~the party seeking discovery or to the claim or defense of~~ any ~~other~~ party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause shown, the court may order discovery of any information relevant to the subject matter involved in the action. Relevant~~The~~ information ~~sought~~ need not be admissible at the trial if the discovery ~~information sought~~ appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by subdivision (b)(2)(i), (ii), and (iii).

(2) Limitations. By order ~~or by local rule~~, the court may alter the limits in these rules on the number of depositions and interrogatories, or ~~and may also limit~~ the length of depositions under Rule 30. ~~and~~ By order or local rule, the court may also limit the

number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

* * * * *

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure

under subdivision (a)(1)(E), or when authorized under these rules or by ~~local rule, order,~~ or agreement of the parties, a party may not seek discovery from any source before the parties have ~~met and~~ conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

* * * * *

(f) Conference~~Meeting~~ of Parties; Planning for Discovery. Except in categories of proceedings~~actions~~ exempted from initial disclosure under subdivision (a)(1)(E)~~by local rule~~ or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 21~~14~~ days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer~~meet~~ to consider~~discuss~~ the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision

(a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) ~~or local rule~~, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have

appeared in the case are jointly responsible for arranging the conference~~and being present or represented at the meeting~~, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14~~10~~ days after the conference~~meeting~~ a written report outlining the plan. A court may by local rule or order require that the parties or attorneys attend the conference in person.

COMMITTEE NOTE

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally-uniform practice. The scope of the disclosure obligation is narrowed to cover only information that supports the disclosing party's position. In addition, the rule exempts specified categories of proceedings from initial disclosure, and permits a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made. Related changes are made in Rules 26(d) and (f).

The initial disclosure requirements added by the 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. The inclusion of the "opt out" provision reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure. The local option also recognized that - partly in response to the first publication in 1991 of a proposed disclosure rule - many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act. It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice. In addition, there was hope that local experience could identify categories of actions in which disclosure is not useful.

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. See D. Stienstra,

Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (Federal Judicial Center, March 30, 1998). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques, 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. See T. Willging, J. Shapard, D. Steinstra & D. Miletich, Discovery and Disclosure Practice: Problems, and Proposals for Change (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. ____ (forthcoming 1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Clients can be bewildered by the conflicting obligations they face when sued in different districts. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. Discovery and Disclosure Practice, supra, at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. § 2072.

These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal "standing" orders of an individual judge or court that purport to create

exemptions from - or limit or expand - the disclosure provided under the national rule. See Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information as a feature of its management of the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that support the claims or defenses of the disclosing party. A party is no longer obligated to disclose witnesses or documents that would harm its position. The scope of the disclosure obligation connects directly to the exclusion sanction of Rule 37(c)(1), for it requires disclosure of the sort of material that would be subject to exclusion. Because the disclosure obligation is limited to supporting material, it is no longer tied to particularized allegations in the complaint. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement.

The disclosure obligation applies to "claims and defenses," and therefore requires a defendant to disclose information supporting its denials of the allegations or claim of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials "warranted on the evidence," and disclosure should include all information that supports such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. This information is similarly excluded from the initial disclosure requirement.

Subdivisions (a)(1)(C) and (D) are not changed. Should a case be exempted from initial disclosure by Rule 26(a)(1)(E) or by agreement or order, the insurance information described by subparagraph (D) should be subject to discovery, as it would have been under the principles of former Rule 26(b)(2), which was added in 1970 and deleted in 1993 as redundant in light of the new initial disclosure obligation.

New subdivision (a)(1)(E) excludes ten specified categories

of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of "proceedings" rather than categories of "actions" because some might not properly be labeled "actions." Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties - and, when needed, the courts - with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there should be little or no discovery in most such cases. Should a defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

Subdivision (a)(1)(E)'s enumeration of exempt categories is exclusive. Although a case-specific order can alter or excuse initial disclosure, local rules or "standing" orders that purport to create general exemptions are invalid. See Rule 83.

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the parties to review the disclosures, and for the court to consider the

report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is therefore encouraged in appropriate cases.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally, but only when disclosure would be "inappropriate in the circumstances of the action." Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures, if any, should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others - such as the damages and insurance information called for by subparagraphs (a)(1)(C) and (D) - may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is "first served or otherwise joined" after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a plaintiff or an intervenor. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.

Subdivision (a)(3). The amendment to Rule 5(d) exempts disclosures under subdivisions (a)(1) and (a)(2) from filing until they are used in the proceeding, and this change is reflected in an amendment to subdivision (a)(4). Disclosure under subdivision (a)(3), however, may be important to the court in connection with the final pretrial conference or otherwise in preparing for trial. The requirement that objections to certain matters be filed points up the court's need to be provided with these materials. Accordingly, the requirement that subdivision (a)(3) materials be filed has been retained and moved to subdivision (a)(3), and it has also been made clear that they should be filed "promptly."

Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) need not be filed until used in the proceeding. Subdivision (a)(3) has been amended to require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed and served.

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the "subject matter" language. This proposal was withdrawn, and the Committee has since then made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the "subject matter" language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. Discovery and Disclosure Practice, supra, at 44-45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the "subject matter" involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject mater involved in the action on a good-cause showing. The amendment is designed to involve the court more actively in regulating the breadth of discovery in cases involving sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal

Judicial Center. See Discovery and Disclosure Practice, supra, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good cause standard warranting broader discovery is meant to be flexible.

The Committee intends to focus the parties and the court on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. However, the rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. See 8 Federal Practice & Procedure § 2008.1 at 121. This otherwise

redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. Cf. Crawford-El v. Britton, 118 S. Ct.___, 1998 WL 213193 at *14 (U.S., May 4, 1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them.

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case.

Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). "Standing" orders altering the conference requirement for categories of cases are not authorized.

The rule is amended to require only a "conference" of the parties, rather than a "meeting." There are important benefits to face-to-face discussion of the topics to be covered in the conference, and

those benefits might be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. Because these conditions vary from district to district, the amendment allows local rules to require face-to-face meetings. Such a local rule might wisely mandate face-to-face meetings only when the parties or lawyers are in sufficient proximity to one another.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the scheduling conference, and the time for the report is changed to no more than 14 days after the conference. This should ensure that the court will have the report well in advance of the Rule 16 scheduling conference or the entry of the scheduling order.

Rule 30. Depositions Upon Oral Examination

* * * * *

(d) Schedule and Duration; Motion to Terminate or Limit Examination.

(1) Any objection ~~to evidence~~ during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A person~~party~~ may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ~~on evidence~~ directed by the court, or to present a motion under paragraph (~~4~~3).

(2) Unless otherwise authorized by the court or stipulated by the parties and the deponent, a deposition is limited to one day of seven hours. ~~By order or local rule, t~~The court ~~may limit the time permitted for the conduct of a deposition, but~~ shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person~~party~~, or other circumstance, impedes or delays the examination.

(3) If the court finds that any~~such an~~ impediment, delay, or other conduct ~~that~~ has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(4~~3~~) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the

district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

COMMITTEE NOTE

Subdivision (d). Paragraph (1) has been amended to clarify the terms regarding behavior during depositions. The references to objections "to evidence" and limitations "on evidence" have been removed to avoid disputes about what is "evidence" and whether an objection is to, or a limitation is on, discovery instead. It is intended that the rule apply to any objection to a question or other issue arising during a deposition, and to any limitation imposed by the court in connection with a deposition, which might relate to duration or other matters.

The current rule places limitations on instructions that a witness not answer only when the instruction is made by a "party." Similar limitations should apply with regard to anyone who might purport to instruct a witness not to answer a question. Accordingly, the rule is amended to apply the limitation to instructions by any person.

Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances. The presumptive duration may be extended, or otherwise altered, by agreement. Because this provision is designed partly to protect the deponent, an agreement by the parties to exceed the limitation is not sufficient unless the deponent also agrees. Absent such an agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.

It is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the need for resort to the court. The limitation is phrased in terms of a single day on the assumption that ordinarily a single day would be preferable to a deposition extending over multiple days; if alternative arrangements would better suit the parties and the witness, they may agree to them. It is also assumed that there will be reasonable breaks during the day. Preoccupation with timing is to be avoided.

The rule directs the court to allow additional time where consistent with Rule 26(b)(2) if needed for a fair examination of the deponent. In addition, if the deponent or another person impedes or delays the examination, the court should authorize extra time. The amendment makes clear that additional time should also be allowed where the examination is impeded by an "other circumstance," which might include a power outage, a health emergency, or other event.

In keeping with the amendment to Rule 26(b)(2), the provision added in 1993 granting authority to adopt a local rule limiting the time permitted for depositions has been removed. The court may enter a case-specific order directing shorter depositions for all depositions in a case or with regard to a specific witness. The court may also order that a deposition be taken for limited periods on several days.

Paragraph (3) includes sanctions provisions formerly included in paragraph (2). It authorizes the court to impose an appropriate sanction on any person responsible for an impediment that frustrated the fair examination of the deponent. This could include the deponent, any party, or any other person involved in the deposition. If the impediment or delay results from an "other circumstance" under paragraph (2), ordinarily no sanction would be appropriate.

Former paragraph (3) has been renumbered (4) but is otherwise unchanged.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

* * * * *

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category,

the part shall be specified and inspection permitted of the remaining parts.

The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall - if appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii) - limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

COMMITTEE NOTE

Subdivision (b). The amendment makes explicit the court's authority to condition document production on payment by the party seeking discovery of part or all of the reasonable costs of that document production if the request exceeds the limitations of Rule 26(b)(2)(i), (ii), or (iii). This authority was implicit in the 1983 adoption of Rule 26(b)(2), which states that in implementing its limitations the court may act on its own initiative or pursuant to a motion under Rule 26(c). The court should continue to have such

authority with regard to all discovery devices. If the court concludes that a proposed deposition, interrogatory or request for admission exceeds the limitations of Rule 26(b)(2)(i), (ii), or (iii), it may, under authority of that rule and Rule 26(c), deny discovery or allow it only if the party seeking it pays part or all of the reasonable costs.

This authority to condition discovery on cost-bearing is made explicit with regard to document discovery because the Committee has been informed that in some cases document discovery poses particularly significant problems of disproportionate cost. Cf. Rule 45(c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena). The Federal Judicial Center's 1997 survey of lawyers found that "[o]f all the discovery devices we examined, document production stands out as the most problem-laden." T. Willging, J. Shapard, D. Steinstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change, at 35 (1997) These problems were "far more likely to be reported by attorneys whose cases involved high stakes, but even in low-to-medium stakes cases . . . 36% of the attorneys reported problems with document production." Id. Yet it appears that the limitations of Rule 26(b)(2) have not been much implemented by courts, even in connection with document discovery. See 8 Federal Practice & Procedure § 2008.1 at 121. Accordingly, it appears worthwhile to make the authority for a cost-bearing order explicit in regard to document discovery.

Cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation (i) or (ii). It is not expected that this cost-bearing provision would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might only occur in certain types of cases; even in "ordinary" litigation it is possible that a given document request would be disproportionate or otherwise unwarranted.

The court may employ this authority if doing so would be "appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)." In any situation in which a document request exceeds these limitations, the court may fashion an appropriate order including cost-bearing. When appropriate it could, for example, order that some requests be fully satisfied because they are not disproportionate, excuse compliance with certain requests altogether, and condition production in response to other requests on payment by the party

seeking the discovery of part or all of the costs of complying with the request. In making the determination whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by Rule 26(b)(2)(iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The court may enter such a cost-bearing order in connection with a Rule 37(a) motion by the party seeking discovery, or on a Rule 26(c) motion by the party opposing discovery. The responding party may raise the limits of Rule 26(b)(2) in its objection to the document request or in a Rule 26(c) motion. Alternatively, as under Rule 26(b)(2), the court may act on its own initiative, either in a Rule 16(b) scheduling conference or order or otherwise.

Rule 37. Failure to Make disclosure or Cooperate in Discovery; Sanctions

* * * * *

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a), ~~or~~ 26(e)(1), or 26(e)(2) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may

impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

COMMITTEE NOTE

Subdivision (c)(1). When this subdivision was added in 1993 to direct exclusion of materials not disclosed as required, the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted. In the face of this omission, courts may rely on inherent power to sanction for failure to supplement as required by Rule 26(e)(2), see 8 Federal Practice & Procedure § 2050 at 607-09, but that is an uncertain and unregulated ground for imposing sanctions. There is no obvious occasion for a Rule 37(a) motion in connection with failure to supplement, and ordinarily only Rule 37(c)(1) exists as rule-based authority for sanctions if this supplementation obligation is violated.

The amendment explicitly adds failure to comply with Rule 26(e)(2) as a ground for sanctions under Rule 37(c)(1), including exclusion of withheld materials. The rule provides that this sanction power only applies when the failure to supplement was "without substantial justification," and a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless.

APPENDIX

REPORTERS' PREFERRED ALTERNATIVE REGARDING COST-BEARING

At the Duke meeting, the Committee elected to insert cost-bearing in Rule 34(b) rather than Rule 26(b)(2), which had been proposed in the materials circulated in advance of the meeting. There was limited discussion of this question, and much more about how to phrase the provision in Rule 34(b). After the meeting, the drafters (Levi, Cooper and Marcus) concluded that Rule 26(b)(2) was actually the better placement for such a provision. The Discovery Subcommittee was able to meet on April 24 and discuss this question, and at that time the members voted 3-2 in favor of inclusion in Rule 26(b)(2). The three judicial members (Levi, Doty and Rosenthal) favored including the provision in Rule 26(b)(2), while the two lawyer members (Kasanin and Fox) favored Rule 34(b) because they were concerned that it would suffer the fate of the other provisions of Rule 26(b)(2) if placed there (i.e., being disregarded).

There was some discussion of polling the full Advisory Committee on whether to change the decision to include the cost-bearing provision in Rule 34(b) and instead to publish a Rule 26(b)(2) version for comment. After the Subcommittee's meeting, however, it was decided not to do so. This Appendix presents this alternative treatment for the information of the Committee, in the expectation that public comment could be invited on the Rule 26(b)(2) alternative.

There are essentially two types of arguments for inclusion of the provision in Rule 26(b)(2). First, as a policy matter it is more evenhanded and complete to include the provision there. Treatment in Rule 34(b) may be seen as primarily benefitting defendants, who are usually the parties with large repositories of documentary information. Depositions, on the other hand, may be exceedingly burdensome to plaintiffs but the Rule 34(b) provision does not apply to them.

Second, as a matter of drafting the cost-bearing provision fits better in Rule 26(b)(2). Including it in Rule 34(b) creates the possibility of a negative implication about the power of the court to enter a similar order with regard to other types of discovery. The draft Advisory Committee Note to Rule 34(b) above tries to defuse that implication, but this risk remains. Moreover, there is a jarring dissonance between Rule 26(b)(2), which says that if there is a violation of (i), (ii), or (iii) the discovery shall be limited, and Rule 34(b), which says it doesn't have to be limited if the party seeking discovery will pay. It is true that, in a way, this dissonance points up the apparent authority to enter such an order under the current provisions with regard to other types of discovery, but that is also another way of recognizing the tension that dealing with the problem in Rule 34(b) creates.

RULE 26(b)

* * * * *

(2) Limitations. By order ~~or by local rule~~, the

court may alter the limits in these rules on the number of depositions and interrogatories, or ~~and may also limit~~ the length of depositions under Rule 30. ~~and~~ By order or local rule, the court may also limit the number of requests under Rule 36. The court shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule~~shall be limited by the court~~, or require a party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party, if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The

court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

COMMITTEE NOTE

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them.

The amended rule also makes explicit the authority that the Committee believes already exists under subdivision (b)(2) to condition marginal discovery on cost-bearing - to offer a party that has sought discovery beyond the limitations of subdivision (b)(2)(i), (ii), or (iii) the alternative of bearing part or all of the cost of that peripheral discovery rather than to forbid it altogether. The authority to order cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation (i) or (ii). It is not expected that this cost-bearing provision would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might only occur in certain types of cases. The limits of (i), (ii), and (iii) can be violated even in "ordinary" litigation. It may be that discovery requests exceeding the limitations of subdivision (b)(2) occur most frequently in connection with document requests under Rule 34, cf. Rule 45((c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena), but the limitations also apply to discovery by other means.

In any situation in which discovery requests are challenged as exceeding the limitations of subdivision (b)(2), the court may fashion an appropriate order including cost-bearing. Where appropriate it

could, for example, order that some discovery requests be fully satisfied because they are not disproportionate, direct that certain requests not be answered at all, and condition responses to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In determining whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by limitation (iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The proposals to amend Civil Rules 4 and 12 form a package. These proposals stem from recommendations made by the Department of Justice, and were reshaped before Advisory Committee consideration through extensive exchanges between the Advisory Committee Reporter and Department of Justice officials. Both proposals are designed to accommodate the ways in which the United States, acting through the Department of Justice, becomes involved in litigation brought against a United States officer or employee to assert individual liability for acts connected with the United States office or employment. The Department of Justice often provides representation for the individual officer or employee, and it is common for the United States to be substituted as defendant in place of the individual officer or employee. This involvement requires that the United States receive assured notice of the action through service on the United States, and that the time to answer be extended to the 60-day period now allowed to answer in an action against the United States or an officer sued in an official capacity.

Civil Rule 4(i) would be changed in two ways. New subparagraph (2)(B) covers "[s]ervice on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." Service is made on the United States in the usual manner under Rule 4(i)(1), and service is made on the individual defendant in the usual manner under Rule 4(e), (f), or (g). The Note reminds readers that reliance on Rule 4(e), (f), or (g) also invokes the waiver-of-service provisions of Rule 4(d). The most difficult drafting challenge in this proposal is the need to find words that distinguish actions on purely individual claims from actions on claims that have a sufficient nexus to the United States office or employment. United States officers and employees engage in the same full range of private activities as other persons. There is no reason to bring the United States into routine private tort actions, domestic disputes, contract disagreements, or the like. The term chosen, "occurring in connection with the performance of duties on behalf of the United States," has no clear pedigree. It was chosen for that reason. The two alternatives presented to the Advisory Committee each resonate to more familiar phrases. One looked to acts "arising out of the course of the United States office or employment," language in part made familiar by workers' compensation systems. The other looked to acts "performed in the scope of the office or employment," a frequently used phrase that appears, among other places, in the Federal Employees Liability Reform and Compensation Act of 1988, 28 U.S.C. § 2679(b)(1). A third alternative, not formally drafted but discussed by the Advisory Committee, would refer to "color of office or employment." It was feared that adoption of any of these phrases would risk encumbering the new rule with unintended complications arising from long use for different purposes. What is needed is a common-sense approach, and new language seems best adapted to that purpose.

The other change in Rule 4(i) amends paragraph (3) to ensure that a claim is not defeated by failure to recognize the need to serve the United States in an action framed only against an individual defendant. New subparagraph (3)(B) provides that a reasonable time to serve the United States must be allowed if the individual officer or employee has been served and new subparagraph (2)(B) requires service on the United States. The current provision of paragraph (3) also would be modified slightly. New subparagraph 3(A) carries forward the essence of present paragraph (3), but makes it clear that a reasonable opportunity must be afforded to serve a United states agency, corporation,

or officer sued in an official capacity if the United States has been served, not only if — as the present rule clearly covers — there are "multiple" agencies (or the like) to be served, but also if there is only one agency (or the like) to be served.

Rule 12(a)(3) would be amended by adding a new subparagraph (B). A 60-day answer period is allowed in an action against an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States. This period is allowed whether or not the United States decides to provide representation or to substitute the United States as defendant. The additional time is required to determine whether to do these things, even if it is decided not to do them.

Rules Amendments Proposed for Adoption Without Publication

Civil Rule 6(b)

A conforming amendment of Rule 6(b) is required to reflect the 1997 abrogation of Rule 74(a), one of the former rules that regulated appeals under the abandoned procedure that allowed parties to consent to appeal to the district court from the final judgment of a magistrate judge. The change is simple and technical. The reference to Rule 74(a) should be stricken from the catalogue of time periods that cannot be extended by the district court:

> * * * but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), ~~and 74(a),~~ except to the extent and under the conditions stated in them.

This change is a "technical or conforming amendment" that, under Paragraph 4(d) of the Procedures for the Conduct of Business, need not be published for comment. The Advisory Committee recommends that it be transmitted to the Judicial Conference at a suitable time.

Rule 4. Summons

* * * * *

(i) Servingee ~~Upon~~ the United States, ~~and i~~Its Agencies, Corporations, or Officers.

* * * * *

(2) (A) Service ~~upon~~ on an ~~officer,~~ agency~~,~~ or corporation of the United States, or an officer of the United States sued in an official capacity, ~~shall be~~ is effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and ~~of the~~ complaint by registered or certified mail to the officer, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States is effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by serving the officer or employee in the manner prescribed by subdivisions (e), (f), or (g).

(3) The court shall allow a reasonable time ~~for~~ to serve~~ice of~~ process under this subdivision for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by subparagraph 2(A), ~~multiple officers, agencies, or corporations of the~~

~~United States~~ if the plaintiff has ~~effected service on~~ served either the United States attorney or the Attorney General of the United States,or

(B) the United States in an action governed by subparagraph (2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

Committee Note

Paragraph (2) is added to Rule 4(i) to require service on the United States when a United States officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. Decided cases provide uncertain guidance on the question whether the United States must be served in such actions. See *Vaccaro v. Dobre*, 81 F.3d 854, 856-857 (9th Cir., 1996); *Armstrong v. Sears*, 33 F.3d 182, 185-187 (2d Cir.1994); *Ecclesiastical Order of the Ism of Am v. Chasin*, 845 F.2d 113, 116 (6th Cir.1988); *Light v. Wolf*, 816 F.2d 746 (D.C.Cir., 1987); see also *Simpkins v. District of Columbia*, 108 F.3d 366, 368-369 (D.C.Cir.1997). Service on the United States will help to protect the interest of the individual defendant in securing representation by the United States, and will expedite the process of determining whether the United States will provide representation. It has been understood that the individual defendant must be served as an individual defendant, a requirement that is made explicit. Invocation of the individual service provisions of subdivisions (e), (f), and (g) invokes also the waiver-of-service provisions of subdivision (d).

Subparagraph 2(B) reaches service when an officer or employee of the United States is sued in an individual capacity "for acts or omissions occurring in connection with the performance of duties on behalf of the United States." This phrase has been chosen as a functional phrase that can be applied without the occasionally distracting associations of such phrases as "scope of employment," "color of office," or "arising out of the employment." Many actions are brought against individual federal officers or employees of the United States for acts or omissions that have no connection whatever

to their governmental roles. There is no reason to require service on the United States in these actions. The connection to federal employment that requires service on the United States must be determined as a practical matter, considering whether the individual defendant has reasonable grounds to look to the United States for assistance and whether the United States has reasonable grounds for demanding formal notice of the action.

An action against a former officer or employee of the United States is covered by subparagraph (2)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need to serve the United States.

Paragraph (3) is amended to ensure that failure to serve the United States in an action governed by subparagraph 2(B) does not defeat an action. This protection is adopted because there will be cases in which the plaintiff reasonably fails to appreciate the need to serve the United States. There is no requirement, however, that the plaintiff show that the failure to serve the United States was reasonable. A reasonable time to effect service on the United States must be allowed after the failure is pointed out. An additional change ensures that if the United States or United States Attorney is served in an action governed by subparagraph 2(A), additional time is to be allowed even though no officer, agency, or corporation of the United States was served.

Rule 12. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings

(a) When Presented.

* * * * *

(3)(A) The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or ~~to a~~ cross-claim~~,~~ — or a reply to a counterclaim~~,~~ — within 60 days after ~~the service upon~~ the United States attorney is served with ~~of~~ the pleading ~~in which~~ asserting the claim ~~is asserted~~.

(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or ~~to a~~ cross-claim~~,~~ — or a reply to a counterclaim~~,~~ — within 60 days after ~~the later of~~ service on the officer or employee, or service on the United States Attorney, whichever is later.

Committee Note

Rule 12(a)(3)(B) is added to complement the addition of Rule 4(i)(2)(B). The purposes that underlie the requirement that service be made on the United States in an action that asserts individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States also require that the time to answer be extended to 60 days. Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.

An action against a former officer or employee of the United States is covered by subparaph (2)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

Form 2

Form 2, paragraph (a), describes an allegation of diversity jurisdiction. It must be adjusted to conform to the statutory increase in the required amount in controversy. Rather than court the risk of continued revisions as the statutory amount may be changed in the future, the Advisory Committee recommends adoption of a dynamic conformity to the statute:

> The matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332 ~~fifty thousand dollars~~.

This change also is a technical or conforming amendment that, under paragraph 4(d) of the Procedures for the Conduct of Business, need not be published for comment. The change, to be sure, is not as purely technical as an amendment to substitute $75,000 for $50,000. It does reflect a conclusion that the form need not, for the guidance of the singularly uninformed, attempt to state the amount required by the current diversity statute. Virtually all lawyers should become aware of statutory changes before it is possible to adjust the form. This conclusion, however, does not seem the sort of policy judgment that should require publication and delay of yet another year in adjusting the form to the current statute. The Advisory Committee recommends that the change be transmitted to the Judicial Conference at a suitable time.

The Advisory Committee renewed the question whether it should be possible to amend the Forms without going through the full Enabling Act process. In 1993 and 1994 the Committee considered a proposal to amend Rule 84(a) by adding a new final sentence: "The Judicial Conference of the United States may authorize additional forms and may revise or delete forms." At the April, 1994 meeting the Advisory Committee concluded that this proposal would exceed the limits of Enabling Act authority. It also was concluded that it would be desirable to recommend legislation establishing Judicial Conference authority to revise the Forms. It is not clear that there is anything more to be done on this subject.

III INFORMATION ITEMS

Federal Rules of Attorney Conduct

The Advisory committee reached consensus on several points raised by Professor Coquillette's report on the draft Federal Rules of Attorney Conduct.

Any federal rule or rules should be adopted in a form that is independent of any of the existing sets of rules. It does not make sense to incorporate rules of attorney conduct separately in each of several existing sets of rules. If special rules are adopted for bankruptcy proceedings, these rules should be incorporated in the body of general rules. Bankruptcy matters often move between the district court and a bankruptcy judge, making it desirable to have a single set of rules. And it emphasizes the continuity and force of the rules to adapt to the needs of bankruptcy by making special provisions — whether or not framed as exceptions — in a single body of rules.

The Advisory Committee is not ready to offer advice on the question whether to adopt a core of federal rules to provide uniform answers to the questions of attorney conduct that most frequently come before federal courts. There are persuasive arguments in favor of relying entirely on dynamic conformity to local state law. The arguments in favor of uniform federal principles also are powerful. The contending interests are important.

The issues raised by Model Rule 4.2 and the draft FRAC 10 are difficult. The Advisory Committee is not yet ready to offer advice on these issues.

The Advisory Committee believes it can best participate in further deliberation of these matters by designating members to an ad hoc committee constituted by appointment of members from the interested committees.

E-Mail Comments on Rules Proposals

The Advisory Committee considered the recommendation of the Standing Committee on Technology that e-mail comments on published rules proposals be accepted by the Administrative Office for a two-year experimental period. The recommendation was approved according to its terms.

Uniform Effective Date for Local Rules

The Advisory Committee began consideration of a proposal to establish a uniform effective date for local rules. The first draft of a revised Rule 83(a)(1) read: "A local rule takes effect on ~~the date specified by the district court~~ January 1 of the year following

adoption unless the district court specifies an earlier date to meet a[n emergency] {special} need, and remains in effect * * *." Only preliminary consideration was given to this proposal. The Committee believes that other local rules topics also deserve study. Among other possibilities, the enforceability of a local rule could be expressly conditioned on compliance with the present requirements for numbering, publication, and filing with the judicial council and Administrative Office. The Committee was advised that the uniform effective date issue need not be resolved at this meeting in order to keep in step with other advisory committees.

Enabling Act Time Chart

Congress deliberately adopted a protracted process for adopting Enabling Act rules. Time and again, the advantages of repeated committee considerations and public testimony and comment have revealed the general wisdom of this approach. The delay is often frustrating, however, in a variety of settings. Even when purely technical or conforming amendments are adopted without a period for public comment, an anomalous rule may remain in seeming effect for an embarrassing period. Urgent needs for rule activity may arise from new legislation or other events. And at times the greater speed of congressional processes provides a temptation to bypass the Enabling Act in favor of legislation that does not enjoy the Enabling Act benefits of careful consideration by many different interested and expert participants. The Advisory Committee plans to consider these matters at its fall meeting, including a review of the relevant suggestions in the Long Range Planning Subcommittee's *Self-Study of Federal Judicial Rulemaking*.

Rule 51

The Ninth Circuit Judicial Council has recommended that Rule 51 be amended to legitimate local rules that require submission of proposed jury instructions before trial begins. Preliminary review of the recommendation suggests that if indeed it is desirable to allow a district court to require pretrial submission, Rule 51 should be amended to authorize this procedure on a nationally uniform basis. There is no apparent reason to leave this issue to resolution by local rule. A proposal has been published to amend Criminal Rule 30 to allow instruction requests "at the close of the evidence, or at any earlier time that the court reasonably directs." It seems too late to catch up to the Criminal Rules schedule. More important, if Rule 51 is to be amended, thought should be given to the possibility of other changes. If pretrial submission is directed, for example, it may be useful to provide guidance on the standards for allowing later requests to conform to trial evidence. This and related Rule 51 topics will be

on the fall agenda.

Working Group on Mass Torts

The continuing study of class actions and Rule 23 has included many proposals addressed to mass-tort litigation; the Rule 23 study, indeed, was prompted in part by the recommendations of the ad hoc committee on asbestos litigation. These proposals often suggested the need for coordinated development of Enabling Act rules and legislation. The Advisory Committee became persuaded that it would be useful to establish a group to review the possibilities of such action. The Chief Justice has authorized appointment of a Mass Torts Working Group that is to study mass tort litigation and report within one year. Judge Scirica is chair of the group, which includes two additional members of the Civil Rules Advisory Committee, liaison members from the Judicial Conference Committees on Bankruptcy Administration, Court Administration and Case Management, Federal-State Jurisdiction, and Magistrate Judges, and a liaison member from the Judicial Panel on Multidistrict Litigation. Professor Francis E. McGovern is a consultant. The Working Group will seek to develop two papers. The first will describe mass-tort litigation, and seek to identify any problems that deserve legislative and rulemaking attention. The second will identify the legislative and rulemaking approaches that might be taken to reduce these problems. The Working Group has planned two meetings with small groups of highly experienced judges, lawyers, and academics. It will work toward recommendations over the summer. The Advisory Committee will seek to set its fall meeting at a time that supports review of as advanced a draft Working Group report as can be managed.

Copyright Rules of Practice

The questions raised by the obsolete Copyright Rules of Practice have been on the Advisory Committee agenda for some time. Advice has been sought from intellectual property law groups, and the Committee believes that it has a good grasp of the issues. Drafts have been prepared to abrogate the Copyright Rules, add a new provision to apply Rule 65 procedure to Copyright impoundment proceedings, and amend Rule 81. These changes would confirm the actual practice reflected in published district-court opinions. Action on these drafts has been postponed to the fall meeting, however, because members of Congress are concerned that any change in copyright enforcement procedures might be misunderstood in the international community. These concerns may be mollified by fall.

Rule 44

The Evidence Rules Committee suggested that Civil Rule 44

should be reviewed because it overlaps many different Evidence Rules. Correspondence between the committee reporters led to the conclusions that Rule 44 may retain some independent meaning, that it would be difficult to ensure that no unintended changes would flow from rescinding Rule 44, and that the current situation has not caused any apparent difficulties. Acting in anticipation of a parallel recommendation to the Evidence Rules Committee, the Civil Rules Committee concluded that there is no need to reconsider Rule 44 so long as the Evidence Rules Committee reaches the same conclusion.

42 U.S.C. § 1997e(g)

The Prison Litigation Reform Act of 1995 amended the Civil Rights of Institutionalized Persons Act by adding a provision that allows any defendant sued by a prisoner under federal law to "waive the right to reply." The rule provides that the waiver does not admit the complaint's allegations, "[n]otwithstanding any other law or rule of procedure." The purpose of waiver is established by the final sentence of 42 U.S.C. § 1997e(g)(1): "No relief shall be granted to the plaintiff unless a reply has been filed." The court may order a reply on finding "that the plaintiff has a reasonable opportunity to prevail on the merits." The Advisory Committee will study the question whether this provision should be reflected by amending Civil Rules 8(d) and 12(a) to say that an answer need not be filed when a statute provides otherwise.

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

March 16 and 17, 1998

Note: This Draft Has Not Been Reviewed by the Committee

The Civil Rules Advisory Committee met on March 16 and 17, 1998, at the Duke University School of Law. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Judge David S. Doty; Justice Christine M. Durham; Francis H. Fox, Esq.; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge David F. Levi; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Anthony J. Scirica; and Chief Judge C. Roger Vinson. Edward H. Cooper was present as Reporter, and Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Sol Schreiber, Esq., attended as liaison member from the Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Eduardo C. Robreno attended as liaison member from the Bankruptcy Rules Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office of the United States Courts. Thomas E. Willging represented the Federal Judicial Center. Observers included Robert Campbell (American College of Trial Lawyers), Alfred Cortese, Marsha J. Rabiteau, Fred S. Souk, H. Thomas Wells (American Bar Association Section of Litigation), and Jackson Williams (Defense Research Institute). Professor Paul D. Carrington, former Reporter for the Advisory Committee, participated in several portions of the meeting.

Chairman's Introduction

Judge Niemeyer opened the meeting by describing the informal Working Group on Mass Torts authorized by Chief Justice Rehnquist. The working group was established because the Advisory Committee's work on Rule 23 has demonstrated that judicial approaches to dispersed mass torts continue to present difficult questions. The questions suggest that answers may require legislation as well as rulemaking. Many different Judicial Conference committees have interests in the topics that may be addressed in wrestling with possible answers. The experience of the Advisory Committee makes it natural for the Advisory Committee to play a leadership role. Judge Scirica has been named chair of the working group, and Sheila Birnbaum and Judge Rosenthal are members. Liaison members have been appointed by the committees for Bankruptcy Administration, Court Administration and Case Management, Federal-State Jurisdiction, and Magistrate Judges. The chair of the Judicial Panel on Multidistrict Litigation also is a liaison member. The working group had its first meeting in March, and has set the dates for its next two meetings. It is to report to the Chief Justice at the end of one year. The Advisory Committee will need to consider the proposed recommendations of the working group at the Advisory Committee's fall meeting, if it is to have any opportunity to act.

Turning to relations with Congress, Judge Niemeyer noted that continuing efforts are being made to maintain open communications. Judge Niemeyer and Judge Scirica have recently testified before congressional committees. They sense that Congress continues to support the Enabling Act process, particularly if effective communication continues. But it must be recognized that congressional processes can operate faster than the Enabling Act process, and the desire to accomplish change quickly is likely to continue to press against deference to the Enabling Act process.

Bills to amend procedural rules directly seem to be introduced with greater frequency. Often the bills are introduced because the sponsors do not know that the Enabling Act process can be

invoked to pursue the same questions, and indeed often is pursuing the questions even as the bills are introduced. An illustration is provided by proposed Civil Rule 23(f), which is pending before the Supreme Court on the Judicial Conference recommendation for adoption. If the Court sends the rule to Congress, it could become effective on December 1, 1998. But some members of Congress do not want to wait that long for a new permissive interlocutory appeal provision for orders granting or denying class certification. Pressure to adopt proposed Rule 23(f) by legislation continues. One possible outcome might be legislation specifically accelerating the effective date after the Supreme Court transmits the proposal to Congress.

The continued concern about the time required to complete the Enabling Act process has raised the question whether some means might be found to compress the time without reducing the breadth of information and intensity of deliberation that now characterize the process. The Standing Committee has recently urged the advisory committees to consider this issue. There was not time to prepare for thoughtful consideration at this March meeting, but the issue will be on the agenda for the fall meeting.

Judge Niemeyer noted that the Standing Committee continues to be interested in local rules. The specific question of adopting a nationally uniform effective date for local rules will be addressed later in this meeting. Other issues also may deserve action.

The Judicial Conference is continuing to follow the recently adopted practice of inviting the chairs of some Judicial Conference committees to attend Judicial Conference meetings. This practice provides an invaluable opportunity to explain committee proposals, to learn of the work of other committees, and to understand Conference concerns. Judge Niemeyer, for example, was able to provide information about Advisory Committee work on discovery, the mass torts project, and local rules questions. Local rules have a seductive fascination for district courts, and the strength of their charms was reflected in some of the reactions to his presentation. Any proposals to effect significant curtailment of local rule freedoms are likely to meet substantial resistance. He emphasized, however, that local rules not only threaten national uniformity, but also emerge from processes that of necessity are not as thorough as the advisory committee process. The 6-person jury, for example, took hold through local rules. The Advisory Committee, after thorough study, concluded that a 6-person jury is a significantly different institution from a 12-person jury. But opposition to the proposal to restore the 12-person jury, growing from entrenched habits spawned by the local rules, proved irresistible.

Finally, it was noted that the docket of unfinished Committee business has grown during the period of attention to Rule 23 and, more recently, discovery. A subcommittee should be designated to review the docket and make recommendations for the best methods of attending to the items that remain on it. This task may be assigned to the subcommittee that originally was formed to review the RAND report on the Civil Justice Reform Act.

Legislative Report

John Rabiej provided a report on pending legislation. A number of new bills bearing on procedural matters have been introduced since the descriptive list in the agenda book. The "sunshine in litigation" bills continue to be introduced. There is some concern in Congress that the Advisory

Committee has devoted too much time to the questions raised by the bills without reaching any final conclusion. (This topic returned later, when the Committee determined to conclude its study of Civil Rule 26(c) protective orders without recommending any present changes in the rule.) The proposed Judicial Reform Act includes controversial provisions, including one that in effect allows a party one peremptory challenge of the trial judge.

Other topics addressed in pending bills involve class actions. There is concern that the Private Securities Litigation Reform Act has encouraged some plaintiffs to file class actions in state courts, leading to bills that would preempt state class actions in this area. Civil Rule 11 bills continue to be introduced, including a specific attempt to use Rule 11 to control frivolous class actions.

The perennial bill to require stenographic recording of depositions is again before Congress.

Copyright legislation and proposed international conventions hold an important place in Congress. Specific concern with international efforts to augment effective copyright remedies may bear in the approach this Committee should take to the obsolete Copyright Rules of Practice, a matter addressed later in the meeting.

One of the bills dealing with court-annexed arbitration includes language for establishing local programs by local rule. The Court Administration and Case Management Committee is addressing this legislation, and has urged that an alternative to local rules be found. The local rules issue is the same here as elsewhere — even when it may be desirable to allow local autonomy, particularly to continue to work through such developing matters as alternate dispute resolution techniques, means should be found that do not encourage a further proliferation of local rules with the attending encouragement to depart from uniform national procedure.

The local rules issue also is reflected in the recently accomplished amendment of the "sunset" provisions in the Civil Justice Reform Act. Although the amended statute is not clear, it seems to authorize continued adherence to local practices that could not be adopted by local rules because inconsistent with the national rules. At the same time, the machinery for changing the local plans is dismantled. This is a perplexing situation that requires further attention.

Mass Torts Working Group

Judge Scirica described the formation and organization of the Mass Torts Working Group. The group was formed because Judge Niemeyer was able to draw on this Committee's experience with Rule 23 revision to convince other Judicial Conference committees that there are problems that cut across the jurisdictions and interests of the committee structure. These problems deserve study, and should be studied in a coordinated way. The Federal Judicial Center will be lending help as well; Judge Zobel is interested, and Thomas Willging will be directing a variety of studies. Professor Geoffrey C. Hazard, Director of the American Law Institute and a member of the Standing Committee, also will participate in working group efforts. The first meeting, held on March 4 in Washington, was successful. Preparations are under way for the next two meetings, which will be held with relatively small numbers of richly experienced judges, lawyers, and academicians. The first of these meetings will be held April 23 and 24 at the Hastings College of the Law, and the second on May 27 and 28 at the University of Pennsylvania Law School. Later meetings will be

planned when needed.

The goals of the working group are limited by the available time. It would be good to generate two documents. The first would describe the mass-torts phenomenon. It seems important to emphasize that each mass tort that emerges is different from its predecessors. There is a risk that experience with one mass tort may be generalized to prescribe approaches to another that, because it is different, is better approached in a different way. A description of the known problems, in short, can be quite useful. The second document would illustrate possible approaches to resolving the problems that are identified in the first. There are many possible approaches. At one end of the line would be means to assert control by a single court over all parties and all issues involved in a mass tort; nothing of the sort exists now. At the other end of the line would be structures and procedures to regularize and foster coordination among courts that entertain related actions, without effecting any consolidation or other common control. The range between these approaches is thickly populated with alternative approaches. Almost all approaches raise obvious questions of jurisdiction, and many involve substantive and choice-of-law issues. Concerns of federalism and comity will occupy a central position.

One question, growing out of the testimony and comments on proposed Rule 23 revisions, is whether federal courts should encourage nationwide classes in mass torts cases. Class actions seem to accelerate filings, and perhaps increase the total number of claims advanced. They present the familiar "private-attorney-general" phenomenon, albeit in a setting quite different from the small-claims class action that acts on claims that otherwise would be abandoned without litigation. There are interdependencies between the Enabling Act rules process and legislation that cannot be ignored.

Various models will be drafted "just to see what they look like." It is hoped that the specific focus provided by even a crude first attempt to anticipate some of the procedural and jurisdictional questions raised by various approaches will enrich the advice provided to the working group.

After the April and May meetings, the working group and staff will reflect on the advice gathered at the meetings and attempt to refine the initial models or develop new models. This experience may suggest the need for a third and similar meeting early in the fall. The target will be to prepare a draft report for consideration by the Advisory Committee at its fall meeting. Although it is not entirely clear what date should be viewed as the beginning and end of the one-year term of the working group, the report should be made no later than the March 4 anniversary of the first group meeting. Consideration by the Advisory Committee thus must be at a fall meeting.

Minutes approved

The Minutes for the October, 1997 meeting were approved.

Discovery

Judge Niemeyer opened discussion of the report presented by the Discovery Subcommittee. He noted that the question is whether changes can be made in discovery that will reduce cost while preserving the full information values we now enjoy. Related questions are whether we can restore a uniform national practice, particularly with respect to disclosure, and whether it is possible to elicit greater judicial involvement with discovery problems.

The Boston College conference in September, 1997, provided fine support for the developing efforts of the Discovery Subcommittee. The symposium articles and working papers will be a good resource for the future, as the conference itself has provided strong support for the subcommittee.

The subcommittee report itself is consistent with the three-level model of discovery that has been before the committee. There is initial disclosure, followed by attorney-managed discovery, within a framework that will provide for judicially managed discovery for cases that extend beyond a reasonably permissive core level of attorney-managed discovery.

The discovery discussion was then turned over to the subcommittee, led by Judge Levi and Professor Marcus.

Disclosure

Four disclosure alternatives were presented by the subcommittee.

The first alternative would retain the disclosure system adopted in 1993, but eliminate the provision that allows individual districts to opt out by local rule. This would establish national uniformity. As reflected in the subcommittee working papers, this alternative would be supported by the initial studies that find the present system effective. The Federal Judicial Center study is the most recent and detailed. On the other hand, this approach would likely encounter vigorous resistance in districts that have chosen to opt out of the national rule. An attempt to force disclosure on reluctant courts, with no more support than the tentative conclusions of early studies, could fail, leaving no disclosure system at all.

The second alternative would repeal most of the present disclosure rule, leaving only the damages and insurance disclosure provisions of Rule 26(a)(1)(C) and (D). These limited disclosures would again be made uniform by defeating the opportunity to opt out by local rule. This approach has the virtue of simplicity, and would accommodate the resistance to disclosure found in many courts.

The third alternative is the main "middle-ground" proposal. This approach would be to retain the present disclosure system and make it national, but limit the witness and document disclosure requirement to items that are in some way favorable to the disclosing party. This proposal would eliminate the "heartburn" that arises from requiring disclosure of the identity of unfavorable witnesses and documents. The model built to illustrate this alternative includes several features that probably should be added to the present rule if it is retained and made nationally uniform. One new feature is an express provision for parties who join the action after disclosure by the original parties. A second is a method of designating the exclusion of categories of cases that should not routinely be made the subjects of disclosure and the Rule 26(f) party conference. Exclusion could be accomplished either by designating categories of excluded cases in the national rule or by incorporating by reference the local district categories of cases excluded from Rule 16(b). The third reaches cases at the opposite end, allowing exemption from initial disclosure because the case is so complex or contentious that it seems more useful to proceed straight to discovery. The draft provides for exclusion by allowing any party to stall disclosure until the district court has an opportunity to review the objection as part of the Rule 26(f) process.

The final alternative is a much-reduced system that virtually eliminates disclosure by reducing it to an item to be considered by the parties at the Rule 26(f) conference. There would be initial disclosure only if the parties agree on it, a possibility that in any event is available without encouragement in the rules. Form 35 would be amended to emphasize the need to consider disclosure.

All subcommittee members agreed that the Rule 26(f) conference was a successful innovation, and should be retained whatever may be done with initial disclosure. It was suggested that Rule 26(f) provides a natural occasion for opening settlement discussions, and that the parties will exchange the information needed to support settlement whether or not there is any disclosure system.

The approach of abandoning disclosure was supported by the observation that in the real world, people know how to use discovery effectively as soon as the action is filed. A great deal of effort should be devoted to preparation and investigation before the case is filed, providing the framework within which discovery can be managed without any need for delay while the limited and relatively formal information required by Rule 26(a)(1) is exchanged. Many districts have decided to manage without disclosure, and are managing quite well. Many problems would disappear if we got rid of this initial disclosure.

In response, it was observed that there are studies indicating that initial disclosure often is a neutral force, but — as in the FJC study results — rather often succeeds in reducing cost or delay, or promoting settlement, or leading to better outcomes. The subcommittee as a whole thought that some form of disclosure should be retained.

The reformulated response was that the names-and-addresses-of-witnesses form of disclosure can help, but that it is not enough to justify the moratorium on discovery that was adopted to support initial disclosure. The names of witnesses and identity of documents can be obtained on first-wave discovery, and the overall discovery process will work more efficiently if there is no need to wait for several months while process is served and the Rule 26(f) conference is arranged.

The subcommittee report then made it explicit that the subcommittee's first choice is the mid-ground that requires disclosure of information favorable to the disclosing party. This approach is, to be sure, a compromise. But it seems to work well in two districts that now have it, the Central District of California and the Northern District of Alabama. If this form of disclosure is adopted on a uniform national basis and continues to work well, it may provide the foundation for an eventual return to the 1993 disclosure system as a uniform national system.

The Rule 26(f) meeting was again hailed as the key, with the suggestion that it should be made to run with as little interference as possible. The middle ground, synthesized with Rule 26(f), is the best system. Paul Carrington's approach seems best. We should set out the things the parties must exchange, and time limits. The court should become involved only if the parties cannot do it. This alternative would include more detailed instructions on what must be accomplished at the Rule 26(f) conference.

Another approach, not recommended by the subcommittee, is to separate disclosure into separate phases, with the plaintiff making disclosure first. The defendant would follow after a

suitable period, responding directly to the plaintiff's disclosures as well as to the issues framed by the pleadings. This approach could support much more detailed disclosures than can be made with simultaneous exchanges based on notice pleadings. The District of South Carolina standing interrogatory approach provides an illustration. It was asked why the subcommittee has not recommended this approach. The subcommittee response was that most cases now have minimal discovery. And in most cases what discovery there is works well. The prospect of forcing detailed discovery of the sort reflected in the South Carolina interrogatories on all cases seems unattractive. They cover more ground than seems likely to be covered in most cases now, and more than is likely to be needed in most cases.

The South Carolina standing interrogatories approach suggests a different possibility, that of drafting pattern discovery requests for complex cases in specific subject areas. Allen Black and Robert Heim are working on an illustrative set for antitrust cases to help measure whether this task is feasible. If promising results emerge, the subcommittee will want to consider the means for generating pattern discovery systems and for advancing them to the world.

Disclosure could be sequenced in waves without adopting the South Carolina interrogatories. Sequencing, however, increases the number of conflict points. It also encourages those who go next to protest that those who went first did not fulfill the disclosure obligation and that this excuses their own failure to respond or sketchy responses.

The need for disclosure was then championed as a prop for the Rule 26(f) conference. Knowing that disclosure will be required soon after the conference encourages preparation for the conference. The mid-ground that requires disclosure of favorable information was supported on the related ground that if the conference does not lead to settlement, the parties know that the disclosures will be followed immediately by discovery demands for unfavorable information.

Brief mention was made of the subcommittee's review of (a)(2) expert-witness disclosure and (a)(3) pretrial disclosure. The subcommittee believes they should be retained. They now are national rules without the opportunity to opt out by local rule that is available for (a)(1) initial disclosure. Some districts, to be sure, have adopted local rules that purport to opt out of these disclosure requirements. The local rules are not consistent with the national rule and appear invalid.

A question was asked as to the strength of the positive responses to disclosure experience. Is it simply a matter that lawyers think they can live with the present (a)(1) system, or that it actually accomplishes real benefits? The FJC study seems encouraging, but is it enough?

The mid-ground proposal discussion then turned to the means of excluding "low-end" cases from the obligation to disclose even favorable information. One possibility studied by the subcommittee but not advanced for further discussion would be delegation to the Judicial Conference. Disclosure would be required in all cases except those excluded by resolution of the Judicial Conference. The possible advantage of this approach is that it would allow more flexible adaptation of the exemption list to changing experience, free from the lengthy Enabling Act process. It was concluded, however, that this advantage also is the vice of this technique. This matter is too much part of the procedure rules to be delegated out of the deliberately thorough Enabling Act process.

A variation on the subcommittee proposal would be to list some excluded categories of cases, in the manner of the list of affirmative defenses in Rule 8(c), with a concluding catch-all equivalent to the Rule 8(c) "and any other matter constituting an avoidance or affirmative defense." It was quickly concluded that this approach would provide more confusion than guidance. It was pointed out that the FJC discovery study sought to exclude cases that typically have little or no discovery, and by adopting half a dozen excluded categories eliminated more than half the cases on a typical docket. It should be possible to adopt a specific list of eight or ten or twelve categories that will exclude a great share of the cases that ought not be subject to the burdens of even limited, favorable-information disclosure.

One additional safety valve is provided by the opportunity of the parties to agree that disclosure is not appropriate. Rule 26(a)(1) now allows the parties to stipulate out of disclosure, and this provision will be retained. The Rule 26(f) conference, in addition, provides the natural focus for agreeing to exclude disclosure when it seems redundant or unnecessary.

The alternative middle ground, which would essentially eliminate witness and document disclosure but leave agreement on such disclosure as an explicit topic for the Rule 26(f) conference was noted briefly. It was provided as an alternative to the "favorable information" disclosure, but without strong support.

Turning to the "high-end" exclusion, it was asked whether there was a risk that obstructionist parties would overuse the opportunity to stall disclosure by objecting. The draft Committee Note attempts to deal with this by discussing the nature of the cases that might make disclosure inappropriate. As an illustration, the draft suggests that disclosure may properly be deferred pending disposition of motions challenging the court's jurisdiction. The draft raises the question whether deferral also may be appropriate pending decision of dispositive motions, particularly those addressed to the pleadings. This sort of question is something that can be worked out in generating the next draft.

The subcommittee's support for the mid-ground approach was reiterated. There are some challenging drafting problems, but they are not so great as to defeat the enterprise. Disclosure in some form should be retained, and made uniform on a national basis.

It was asked whether trial judges would encounter substantial burdens in administering the distinction between favorable and not favorable information. Thomas Willging responded that in studying the two districts that take this approach to disclosure, the FJC found that attorneys spend less time with the court, and more time meeting and conferring with each other. It seems to work. But this information does not address the prospect that claimed failures to disclose will become issues at trial. At the same time, limiting the disclosure requirement to favorable information provides a much more natural and effective base for the exclusion sanction at trial. The threat of exclusion does not work well as to information a party does not want to use at trial, but should work well as to information a party does want to use.

Professor Carrington observed that the 1991 committee would say that the mid-ground proposal goes in the right direction. During the deliberations then, disclosure was not limited to favorable information because of the expectation that favorable-information disclosure would

inevitably be followed by discovery demands for unfavorable information. But in the setting of adopting a truly national rule, the recommendation is a politic step. There is no virtue in the local option, which was added to the 1993 amendments from a sense of compulsion arising from the variety of practices that had proliferated under the Civil Justice Reform Act. There are enough virtues in disclosure to support adoption of a uniform national rule.

The committee voted unanimously to adopt the favorable-information approach to disclosure, and to work further on the details.

Work on the details must be done expeditiously after the committee has gone as far as can be done in full meeting to establish the general directions. The Style Subcommittee must be allowed time to review the drafts, and then the full Advisory Committee must review them. A report to the Standing Committee must be prepared by mid-May.

The first detailed drafting question is how to describe "favorable information." Those words will not do the job; too much information is potentially favorable or unfavorable to any given position. Three alternatives were considered: (1) "information that tends to support the positions that the disclosing party has taken or is reasonably likely to take in the action"; (2) "information that the disclosing party may use to support its positions in the action"; and (3) "information upon which the party bases its claims, prayer for damages or other relief, denials, or defenses in the action." Difficulties can be imagined in each formulation, and offsetting advantages.

The "may use" formulation was supported on the ground that it ties directly to the incentive to disclose, and best describes to all parties the disclosure obligation. The subcommittee recommended — with the support of the committee — that the duty to supplement disclosures imposed by Rule 26(e)(1) be retained. A party can easily understand and implement the duty to disclose the names of witnesses and identity of documents it may want to use at trial. It can as easily understand and implement its freedom to fail to identify the material — which may amount to warehouses full of documents — that it does not want to use at trial. As trial preparation proceeds, the disclosure obligation can be supplemented easily and naturally. There is no real risk that a party can avoid the duty to supplement by arguing that it did not know at the time of the initial disclosure that it might want to use information it later decided to use.

The formulation that addresses information on which a party bases its claims, denials, or defenses was supported on the ground that "bases" implies that the information is significant. The information need not be everything that the party may want to use at trial; this formulation narrows the obligation of initial disclosure. In particular, it avoids the need to identify witnesses or documents that will be used only for impeachment purposes.

Discussion of the draft drawn from information on which claims are based quickly concluded that whatever approach is taken, there is no need to refer to the "prayer for damages or other relief." Damages and relief are part of the claim, and the disclosure requirement of Rule 26(a)(1)(C), which will be continued under all proposals, will catch up most of the damages element as a double precaution.

An initial expression of preferences canvassed four possible descriptions of disclosure information: "tends to support" got one vote. "Supports" got three votes. "May use to support" got

three votes. "Upon which bases" got four votes. Further discussion led to further endorsements for "supports." It was urged that this term fits the time of initial disclosure, a time when the parties do not know what they may want to use at trial. "We want to know what you know will support your positions." "Supports" clearly signals the intention to exclude an obligation to disclose unfavorable information. "May," in the "may use" formulation, is equivocal. And "positions," in any of the formulations, is too broad. "May use" again was endorsed because it provides the focus for enforcement by exclusion at trial. It is an essential qualifier, because a party may not know with certainty what it will use. And "use" avoids the ambiguity of "supports," since the same information may both support and undermine a position — many a witness has both supporting and undercutting information, as does many a document. And parties will disclose more than they will with "supports."

The next vote provided 7 votes for "supports claims, denials, or defenses," no votes for the "bases" formulation, and 4 votes for "may use to support the disclosing party's claims, denials, or defenses." It was decided to adopt the "supports" formulation, most likely to be rendered as "discoverable information supporting the claims, denials, or defenses of the disclosing party."

With disclosure limited to supporting information, attention turned to the limitation in present (a)(1)(A) and (B) that witnesses and documents need be identified only as relevant "to disputed facts alleged with particularity in the pleadings." This limit was introduced to the disclosure provision because notice pleading often makes it very difficult for an opposing party to know the contours of the case as it will emerge from discovery. The whole design of the 1938 system, indeed, was to transfer much of the information exchange between the parties from pleading to discovery. Contention interrogatories, requests for admission, and Rule 16 practice have developed over the years to augment the subordination of pleading even as to identification of the legal issues. But this concern is greatly reduced when the nature of disclosure is reduced to disclosure of information supporting the claims, denials, or defenses of the disclosing party. The disclosing party presumably knows at the time of disclosure what its positions will be, and is obliged to supplement its disclosure as it perfects its understanding of its own positions. Nor is it simply that there is no apparent reason for continuing this limitation. A major reason for adopting it was the hope that it would encourage each party to plead with greater particularity so as to enhance the disclosure obligation imposed on its adversaries. With disclosure changed to supporting witnesses and documents only, the limitation would encourage each party — and perhaps most especially the plaintiff — to plead in broad terms so that it has no disclosure obligation. The committee voted 9 to 2 to delete the words that limit disclosure to disputed facts pleaded with particularity.

Discussion next turned to the draft designed to relieve the parties of the disclosure obligation in "high-end" cases that are better handled through court-managed discovery. The draft Rule 26(a)(1)(E) provides for disclosure with 10 days [later changed to 14 days] after the Rule 26(f) meeting "unless a party contends that initial disclosure is inappropriate in the circumstances of the action, in which event disclosure need not be made until 10 [later changed to 14] days after the initial scheduling order is entered by the court pursuant to Rule 16(b)." The effect would be that disclosure occurs if all parties want it, and — under the "unless otherwise stipulated" language carried over from the current rule — does not happen if all parties agree to dispense with it.

It was asked whether language should be included to identify "complex or class actions" as

inappropriate for disclosure. The subcommittee responded that this possibility had been considered because it is indeed the complex cases that today are routinely exempted from disclosure in favor of judicial discovery management. Anecdotal experience suggests strongly that disclosure is inappropriate in such cases. But all of the studies suggest that it is not possible to define "complex" cases by subject-matter or other criteria.

Further discussion of drafting alternatives led to adoption of this formulation:

> These initial disclosures must be made at or within 14 days after the subdivision (f) meeting of the parties unless otherwise stipulated or directed by the court. If a party objects before this time that initial disclosures are not appropriate in the circumstances of the action, the court must determine what disclosures — if any — are to be made, and direct that any disclosures be made no earlier than 14 days after entry of the initial scheduling order under Rule 16(b).

The next set of problems arises from the failure of the present rule to address the disclosure obligation of parties who join the action after the time for initial disclosures. The Rule 26(e)(1) duty to supplement does not reach later-added parties because it applies only to a party who has made a disclosure. The proposed draft, also part of proposed 26(a)(1)(E), would provide that: "Any party not served at the time of the meeting of the parties under subdivision (f) shall make these disclosures within 30 days after the date on which the party first appears in the action unless otherwise stipulated or ordered by the court, or unless the disclosure obligation has been excused for other parties by stipulation or order." Difficulties in this formulation were recognized. The reference to a party "served" seems to overlook those who join by intervention, plaintiffs added by amendment of the complaint, and perhaps others. The reference to a person not a party "at the time of the meeting of the parties" seems to fit awkwardly with those who become parties immediately before the meeting. It was agreed that the problem of later-added parties should be addressed, and that these apparent drafting glitches should be worked out. The resolution may look something like this: "A person who becomes a party after the eleventh day before the subdivision (f) meeting of the parties must make these disclosures within 30 days after becoming a party unless otherwise stipulated or ordered by the court, or unless the disclosure obligation has been excused for other parties by stipulation or order."

A question not raised by the subcommittee was presented by the question whether disclosure should occur before the Rule 26(f) meeting. Paul Carrington noted that this had been the initial thought of the committee when Rule 26(f) was rewritten for 1993, but that it had been concluded that the meeting is necessary to make disclosure effective. The need may be reduced to some extent by the proposed retrenchment of disclosure to supporting information. But even under this reduced disclosure system, the meeting may well serve to focus the positions — the claims, denials, and defenses — of the parties. It was suggested that perhaps the note to the amended Rule 26(f) should suggest that disclosure before the meeting is desirable. But it was responded that even if that would be desirable in an ideal world, the meeting is where arrangements particular to the case are made. Disclosure may not be important to what actually is done. And the committee was reminded that Rule 26(f) seems widely regarded as the most useful of the 1993 discovery changes — and there have not been any complaints that it would be improved by requiring disclosure before the meeting. The meeting "breaks the ice." Disclosure often occurs at the meeting. The committee agreed that no change should be made.

Another question not raised by the subcommittee was identified in the timing provisions of Rule 26(f). It sets the meeting at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). It requires a report to the court "within 10 days after the meeting." Because of Rule 6(a), "intermediate Saturdays, Sundays, and legal holidays" are excluded from the 10-day period. With a three-day legal holiday weekend, it is possible that the report will be due one day after the scheduling conference or order (the intermediate weekend and holidays are not excluded from a 14-day period). The need to have the report due in time to allow consideration before the conference has led one member to routinely order that the Rule 26(f) conference be held within 30 days after an answer is filed; the report is to be filed 14 days after the meeting. The Rule 16(b) conference follows the report unless the parties do not want the conference — and most often the parties work things out at the meeting. It might be desirable to adopt an idea suggested by Paul Carrington, setting the meeting within 90 days after a defendant is served.

Renewed discussion of the 26(f) time limits agreed that it is not desirable to have the report of the meeting presented to the court for the first time at the scheduling conference. It was agreed that the time for the meeting should be set at 21 days, rather than the present 14 days, before the scheduling conference or order. The time for the report of the meeting also should be changed, to 14 days after the meeting. This change will coincide with the change to Rule 26(a)(1)(E) that sets the time for disclosure at 14 days after the Rule 26(f) meeting, and — in part by moving outside the Rule 6(a) rules for calculating periods of less than 11 days — set a clear date one week before the scheduling conference. This sequence will allow the parties to focus on a common deadline for disclosures and report, and will ensure adequate time for the court's consideration of the report.

Other Rule 26(f) matters also were raised. The subcommittee report had not suggested any exclusions, but its recommendation to delete the power to adopt exclusions by local rule is accepted by the committee. That leaves a need to provide for exclusion in low-end cases. It was noted at the Boston College conference that the meet-and-confer requirement is an unnecessary burden in many simple cases, simply one more useless hoop to jump through. The committee agreed that Rule 26(f) should be modified to incorporate the same low-end exclusions as are adopted for initial disclosures under Rule 26(a)(1). The court will continue to have discretion to exclude other cases.

The final Rule 26(f) question is posed by the language requiring that the parties "meet to discuss," and making them responsible for "being present or represented at the meeting." The 1993 Committee Note states that the rule requires a face-to-face meeting. This obligation ordinarily is reasonable in dense urban areas, but may impose untoward burdens in large and sparsely populated districts. The present power to exempt cases by local rules enables each district to take account of its own circumstances and adopt mollifying exemptions — one example was offered of a rule that allows a telephone meeting when any attorney is located more than 100 miles from the court. Removal of the option to have local rules requires that this issue be reconsidered for the national rules. There are great advantages in a face-to-face meeting that cannot be duplicated by telephone, and are not likely soon to be duplicated by videoconferencing. It might be possible to adopt a compromise rule that seeks to preserve these advantages by requiring the parties to "confer in person if geographically practicable." Potential administrative difficulties, however, persuaded the committee to agree without dissent to change the "meet" requirement to a "confer" requirement.

The topic of low-end exclusions from disclosure and the Rule 26(f) meeting returned. With

the help of the Federal Judicial Center, a survey of exclusions adopted by local rules shows an astonishing array of categories of cases that have been excluded in at least one district. Some of the exclusions are unique, and a few are inscrutable. Some are fairly common, and some are almost universal. The effort must be directed toward identifying common categories of actions that typically will not benefit from disclosure or a Rule 26(f) meeting because typically there is little or no occasion for discovery. A first rough estimate includes at least these cases: bankruptcy appeals; bankruptcy matters withdrawn from the bankruptcy court (see § 157(d)); actions for review on an administrative record; social security review cases; prisoner pro se cases; habeas corpus; actions challenging conditions of institutional confinement (perhaps unnecessary if prisoner pro se cases are excluded, particularly since complex actions needing discovery are brought under the Civil Rights of Institutionalized Persons Act); actions to enforce or quash administrative summonses or subpoenas; other Internal Revenue Service actions; government collection actions; civil forfeiture proceedings; student loan collections (perhaps only those below $75,000); proceedings ancillary to proceedings in other courts — as for discovery or to register or enforce a judgment; and actions to enforce arbitral awards. Further thought will be given to which of these categories may make most sense, and the Administrative Office will be asked for help in developing formulas that accurately describe the intended categories. It was agreed that it would be unwise to exclude all pro se cases; the disclosure requirement can prove especially useful in focusing some pro se actions.

Scope of Discovery

The subcommittee reminded the committee that a major impetus for the present discovery project was the recommendation of the American College of Lawyers that the committee adopt the discovery scope limitation first advanced by the American Bar Association Litigation Section in 1977. The subcommittee brought three models to the committee for consideration. One would limit the initial scope of discovery to matter relevant to "the claim or defense" of a party," but allow the court to expand discovery to "any information relevant to the subject matter" of the action. The second would modify the final sentence of present Rule 26(b)(1), emphasizing that only relevant information may be sought under the permission for discovery of information that is not admissible but is reasonably calculated to lead to the discovery of admissible evidence. The third would add to (b)(1) an explicit cross-reference invocation of the "reasonable discovery" principles articulated in present (b)(2).

The question whether to displace the "subject matter" scope of discovery limit was introduced by the reminder that the Advisory Committee published essentially this same proposal in 1978, and then withdrew it in light of the comments received. The proposal has been considered periodically since then, and was considered during the deliberations that led to the 1993 discovery amendments. There is reason for caution because it is not clear whether the proposed change would lead to mild restraint or considerable curtailment. Whatever the outcome, moreover, the very fact of change will lead to a transitional period in which contending parties seek to attribute unintended meanings to the change. No language is available to calibrate precisely the degree of desired change, even if agreement could be reached on the precise degree. These concerns suggest that the Committee should demand a clear reason for moving toward the change.

The context for defining the scope of discovery begins with the 1938 decision to turn to notice pleading, to be fleshed out by discovery managed by the attorneys. Discovery kept expanding

through the 1970 amendments. More recent efforts have been directed toward reducing the excesses of lawyer-managed discovery. The ABA suggestion has been with us for a long time. At the Boston College conference, many lawyers suggested that adopting this suggestion would not lead to any great change. The modified version created by the subcommittee is new, and addresses the concerns that have surrounded the proposal. Discovery remains available of matter relevant to the subject matter of the litigation, but this full sweep of discovery is made subject to court control. Doubts as to the scope of the change in rule language will be resolved by agreement of the parties — always a good thing in discovery — or will be taken to the court. The change thus will provide an effective way to encourage involvement by courts that have been reluctant to devote time to discovery management. The single most important discovery change championed by lawyers is greater judicial involvement in problem cases. This proposal will help move toward that goal.

The subcommittee has not formed a recommendation on this model. But it acknowledges the effort and help provided by the American College in advancing and refining the initial proposal.

Robert Campbell, representing the American College, then addressed the initial recommendation, which did not restore discovery relevant to the subject matter if ordered by the court. He noted that in 1995 Judge Higginbotham, then chair of this Committee, asked the American College to study discovery issues. The question is whether a change from subject matter to claims and defenses makes a difference in the real operation of discovery. The American College believes that it does make a difference. It has offered examples of cases in which judges thought the "subject matter" language of the present rule does make a difference. The Board of Regents of the College has adopted the recommendation as the recommendation of the College itself, a highly unusual step. Neither the College nor its federal rules committee has considered the possibility of restoring subject-matter discovery under court control; probably they would oppose this new feature.

The first reaction voiced was that this proposal "will create a firestorm." If it is coupled with discovery cost-shifting, the Committee will be seen as defendant-oriented. Even the more modest change in the language about discovery of inadmissible matter will draw fire, but it makes sense. It is, by contrast, difficult to say just what difference there is between "subject-matter" discovery and "claim or defense" discovery. Rule 26(b)(2) now establishes ample power to limit discovery in suitable proportion to the needs of the case. The proposal "projects an image, however much it is not intended, that all that is wrong with discovery is the practice that favors plaintiffs." The proposal abandons 60 years of precedent establishing the scope of discovery in return for a well of new uncertainties. The more sensible approach is to offer minor adjustments in the sentence that deals with discovery of inadmissible evidence, and to enhance the force of (b)(2) principles by explicit cross-reference. We should be particularly wary of discovery proposals advanced by senior members of the bar who have advanced to careers that allow delegation of most hands-on discovery to younger lawyers.

The proposal was defended as "not earth-shaking, but a good idea. Document discovery is the problem. This will send a signal. That's all it will do."

The subcommittee noted that the authority to expand the scope of discovery back to the subject-matter scope of the present rule is an important part of this model. It puts the judge in the position of demanding and considering explanations of the needs for the full sweep of discovery.

There is no need for metaphysical precision in describing the different scopes of discovery; this is simply a practical means of encouraging judicial control by expanding the occasions for seeking it. The proposal "changes the message of open-ended, unrestricted discovery." It may force the parties to identify their needs more clearly.

This model, in short, is not the American College proposal. It is instead a means of stimulating judicial involvement. It changes the balance between lawyer-managed discovery and court-managed discovery. It is important to find some means to encourage court management. Rule 26(b)(2) was intended to have this effect, but inexplicably has failed to have much noticeable impact. Establishing different scopes for lawyer-managed and court-managed discovery, and expressly incorporating (b)(2) by reference, will help accomplish what (b)(2) was designed to do many years ago.

Strong support was expressed for the American College proposal. Out-of-control discovery is common. No one who participated in designing the discovery system foresaw what it would become. Technological advances in storing and retrieving information have only exacerbated a problem that already was made acute by document discovery excesses. Adoption of the proposal will send an important signal that discovery must be better controlled. Reasonable proportionality is required by (b)(2) now, and it has not been made to work.

A judge observed that experience in refereeing many discovery disputes shows that the real culprit is in the "reasonably calculated" sentence. We do need to establish some new limit on the scope of discovery. But we should clarify the connection between the "reasonably calculated" sentence and the two separate scopes of discovery — does it bear on information relevant to the parties' claims or defenses, or does it bear on information relevant to the subject matter of the action?

It was asked whether it is possible to provide more concrete illustrations of the differences that the proposal would make. Doubt was expressed at the Boston College conference whether this change in the language defining the scope of discovery would make much difference. If that is uncertain, it is certain at the same time that any change will lead to many discovery disputes. Can we be sure that the change is worth the uncertainty and the resulting costs?

It was responded that the change is designed to create a new management tool to be used when the parties fail to effect reasonable discovery. The adoption of a distinction between the scope of lawyer-controlled discovery and the scope of court-controlled discovery is a great compromise. It is an advance over present (b)(2) because courts are not effectively using the management possibilities established by the proportionality principle. It will make a difference, among other litigation, in product-liability cases that now seem particularly prone to excessive discovery demands.

On a vote among three options, no votes were cast for adhering to present Rule 26(b)(1). Two votes were cast for bypassing any change in the scope of discovery, but in favor of cross-referring to (b)(2) and modifying the language about discovering inadmissible evidence. Nine votes were cast for narrowing the scope of lawyer-controlled discovery to matter relevant to claims or defenses, while allowing the court to expand discovery back to matter relevant to the subject matter

of the action.

A drafting change was suggested to limit discovery of inadmissible evidence only if relevant to the parties' claims or defenses. This limit could be expressed by beginning the second sentence: "This relevant information need not be admissible at trial * * *." It was responded that if the court orders discovery of information relevant to the subject matter, the same opportunity to discover inadmissible evidence should be available. A motion to add "this" failed.

It was asked whether the reference to (b)(2) principles should be limited to the (b)(2)(iii) cost-benefit provision. The subcommittee responded that this question had been considered and resolved in favor of incorporating all of the (b)(2) principles. All are important, and all deserve this emphasis.

Further discussion of drafting led to agreement on this language for a revised (b)(1)

> **(1) In General.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The court may, for good cause shown, order discovery of any information relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by subdivision (b)(2).

Deposition Length

In 1991 the Committee published a proposal that would limit the length of a deposition to 6 hours, unless additional time were allowed by the court. The proposal was withdrawn from the final amendments. During the San Francisco meeting that first began gathering discovery information, many attorneys suggested that no deposition should need more than 6 hours absent obstructionist activity. If a limit is to be adopted, there is a question as to the best means of defining the limit — as six hours, as one business day, or as one day of six hours.

It was asked whether a longer time should be allowed for expert depositions — some fear was expressed that many expert witnesses are expert at drawing out a deposition without saying anything.

It was observed that in the Agent Orange litigation 168 depositions — including expert depositions — were taken in one day each. This was made possible, however, by requiring that before the deposition all documents to be used be submitted to the deponent, and read by the deponent. It was noted that the subcommittee had considered the document-submission requirement, but had put it aside because a number of lawyers had expressed the fear that deponents would be swamped with unrealistic volumes of documents submitted to protect any possible opportunity for use.

Concern was expressed that it will be difficult to allot six hours, or a day, among all the

parties, particularly in cases that involve more than two parties. But confidence was expressed that lawyers would generally work out these problems, recognizing that the court will have power to extend the time limit and that most courts will be displeased by requests to make the parties behave sensibly in ways they should be able to work out for themselves.

It was asked whether there is any pressing need to set a presumptive limit for depositions. The response was that many lawyers at the Boston College conference noted that the expense of depositions is a significant problem. An illustration was offered of practice in New York, where depositions lasting 6 to 8 days are routine in employment-discrimination cases. A presumptive limit is needed; appropriate requests for additional time will be granted routinely. Plaintiff lawyers are particularly apt to favor a limit as a means of reducing unnecessary time and also reducing transcript expenses.

It was decided by a 9 to 1 vote that a durational limit should be adopted.

Turning to the task of defining the limit, it was suggested that a "one business day" term would avoid the foreseeable problems of squabbling over the hourglass or stopwatch, and would particularly avoid the definitional questions presented by the 1991 proposal for 6 hours "of actual examination of the deponent on the record." Any time limit is an invitation to filibuster; the "one business day" expression may reduce the temptation. The notion of a business day is admittedly loose; this should work in its favor.

Confidence was expressed that there is not as much game playing now as formerly, and that the vast majority of attorneys who know there is a time limit will prepare in advance and complete depositions within the limit.

It was noted that the FJC data indicate that courts that impose time limits seem to have longer depositions. These data do not, however, provide any information as to the direction of any causal connection that may exist. It seems more likely that time limits have been adopted in districts that have had problems with undue deposition length, and that it is long depositions that have caused the rules to be adopted, than that the rules have caused long depositions.

In response to another question, it was stated that the subcommittee recommendations would include amendment of Rule 26(b)(2) to allow a court to set different limits on deposition length by local rule. In the end, however, it was agreed that local rules would not be allowed to change the presumptive limit. Alterations would require consent of the parties and deponent or court order. Neither Rule 26(b)(2) nor Rule 30(d)(2) will allow variation by local rule.

It was urged that it would be better to place the deposition time limit in Rule 30(d)(2) than in Rule 30(a).

It was suggested that although there may be significant differences between the time needed for depositions for discovery and the time needed for depositions for trial testimony, these differences can be taken into account in administering the limit. Many lawyers will prefer to keep trial depositions short; the fear that these depositions may need extra time may be misplaced.

After concern was expressed about the indefiniteness of "one business day," a vote found 6 members in favor of "one day of n hours," and 5 members in favor of "one business day."

Discussion of how many hours should be specified found 6 members in favor of 7 hours, and 5 members in favor of 8 hours.

It was agreed that the limit should be "one day of 7 hours." The Committee Note should discuss the desirability of flexible administration — many doctors, for example, seek to schedule depositions beginning late in the afternoon, perhaps at 4:30, so as to be able to treat patients all day.

The question whether the limit should be expressed as "actual examination of the deponent on the record" returned. Although the actual meaning of this limit is unclear, it seems to exclude colloquy between counsel, rest breaks, and the like. It was noted that this limit will exacerbate timekeeping problems, and even invite them. It will be argued that objection time is not actual examination time, and so on. It was agreed that this limit would be deleted. The Committee Note should say that reasonable breaks are permitted.

The committee agreed unanimously that Rule 30(d)(2) should be amended to provide that "a deposition is limited to one day of seven hours." It was further agreed that extension of this time by stipulation should be permitted only if the deponent joins the stipulation. The purpose of the time limit properly includes witness protection.

It was further agreed that there is no need to adopt a parallel time limit for Rule 31 depositions on written questions. If unreasonably long questions are submitted, relief can be won from the court in advance.

Cost-Bearing

The subcommittee noted that both the Reporter and Special Reporter believe that Rule 26(c) allows a court to enter a protective order that conditions discovery on payment of all or part of the expenses by the party demanding discovery. Similar authority should be read into Rule 26(b)(2) as a less limiting alternative to an order that simply prohibits discovery as disproportionate to the needs of the case or otherwise beyond reason. Nonetheless, it may be helpful to adopt an express cost-bearing provision if it is believed that courts should consider this alternative more frequently.

The subcommittee proposal is that Rule 26(b)(2) be amended to allow the court to order that a party demanding discovery pay all or part of the reasonable expenses incurred by the responding party if the court makes any of the determinations that authorize an order that discovery not be had, as specified in present items (i), (ii), or (iii). In many situations, this proposal will expand, not contract the opportunity for discovery — the determination that discovery is inappropriate under item (i), (ii), or (iii) would lead to an order barring the discovery, but the softer alternative is allowed of permitting discovery on payment of part or all of the resulting expenses. The item (iii) cost-benefit calculation is the one most likely to be involved in this process: the cost of the discovery is reallocated to a party willing to bear it in return for the anticipated benefits. But nothing in this process would authorize discovery beyond the scope permitted by Rule 26(b)(1); cost-bearing is simply an alternative to a (b)(2) prohibition.

It was suggested that this proposal would not accomplish any meaningful change. Judges now condition discovery on payment by the demanding party. Nonetheless there is likely to be protest by those poorly informed, or by those who oppose present practice, that this proposal is

simply one more attempt to protect institutional defendants that have a wealth of discoverable information. We are accustomed to a procedure that generally makes no attempt to allocate the costs of demanding and responding to discovery. To emphasize the authority to impose on the demanding party not only the costs of demanding discovery but also the costs of responding will go against the grain of many. If it is feared that (b)(2) is not being used as often or as vigorously as should be, the Committee should find ways to draw attention to (b)(2) principles. Parties and courts can be trained to use (b)(2) more. "It is there and available."

In response, the subcommittee noted that even though courts probably do have authority under present rules to condition discovery on payment of costs, the authority is not clearly stated. It is not clear that all courts understand the power, and it is not clear that it is used as often as it would be if made explicit. The lack of any explicit provision may make the power seem more exotic than it is.

An alternative might be to add this provision to Rule 26(c)(2), so that a protective order specifying the "terms and conditions" of discovery could include cost-bearing terms. The Rule 26(b)(2) context, however, provides ready-made criteria that seem appropriate to the purpose. The (b)(2) conditions — the item (i), (ii), and (iii) determinations that justify a limitation — must be coupled to the limitation.

Another alternative was suggested. Judge Schwarzer has suggested that since the most frequently cited source of unduly expensive discovery is document production, the cost-bearing principle should first be adopted as part of Rule 34. Although it may prove awkward to draft a Rule 34 provision that seeks to define the "exceptional" or "complex case," the purpose would be to reach the cases that involve large burdens of document search and retrieval with little prospect of benefits reasonably proportioned to the burdens. It remains true that it is very easy to impose enormous document production costs at little cost to the demanding party. One of the complaints voiced about document discovery, indeed, is that some litigants do not even bother to read all of the documents whose production they have demanded.

Concern was expressed that if a Rule 34 approach were taken, it might seem to exclude by implication the cost-bearing authority now found in Rule 26(c). The Committee Note will have to make clear the intention to emphasize the power as particularly useful in document-production cases, while retaining it as a general matter under Rule 26(c) as well.

In addressing the Rule 34 proposal, it was noted that it is not proper to characterize either recommendation as cost-sharing. All that is involved is the power to insist that a party making a demand for discovery that lies at the margin of reasonableness pay part or all of the costs of responding. Discovery should not afford a carte blanche to impose staggering costs on other parties. Civil Rule 45(c)(2)(B) has made clear that nonparties are to be protected against the costs of producing documents in general terms. Parties deserve similar protection against demands that, although within the Rule 26(b)(1) scope of discovery, seem excessive.

The subcommittee moved adoption of Judge Schwarzer's Rule 34 version, including references to both Rule 26(b)(2) and Rule 26(c). The motion was resisted on the ground that the original subcommittee version was better. Cost-bearing protection may be useful against such events

as distant depositions — a party who wishes to take a marginally useful deposition in a distant place might be ordered to pay another party's travel costs, for example. The general approach, moreover, avoids the difficulty of ensuring against undesired negative implications that cost-bearing is inappropriate outside Rule 34 discovery. The subcommittee proposal, further, explicitly requires that the court make one of the Rule 26(b)(2) determinations as a foundation for ordering one party to bear another party's costs. The Schwarzer proposal, in addition, requires the court to make an advance estimate of compliance costs, a tricky concept to manage.

The Rule 34 approach was again championed on the ground that it addresses the most common source of complaint about excessive discovery. This is the problem everyone continues to talk about. Further drafting can establish a clearer link to Rule 26(b)(2) and require its determinations. There is a similarity between this proposal and reforms contemplated in England. The rule is likely to be invoked only in cases that involve parties able to bear the discovery costs that may be imposed, or who at least are represented by firms able to bear the costs. It was suggested that the Committee Note should say that the cost-bearing power should be exercised only in cases involving large document volumes.

The original subcommittee proposal to adopt a general cost-bearing provision in Rule 26(b)(2) failed by 4 votes for and 7 votes against.

A proposal to add cost-bearing to rule 34 was adopted by 10 votes for, 1 vote against.

Drafting the Rule 34 approach remains to be done.

Judge Schwarzer's proposal was to add a new paragraph to Rule 34(b), following the present second paragraph:

> On motion of the responding party, made in accordance with Rule 26(c), the court shall, when appropriate to implement the provisions of Rule 26(b)(2), determine the estimated cost of responding to a request and impose all or part of the cost on the requesting party.

Three alternatives were considered. Two of them would add a new sentence at the end of the second paragraph in Rule 34(b): "On such a motion, the court shall limit the discovery, or require the moving party to pay part or all of the reasonable expenses incurred by the responding party, as appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)." The second alternative omitted the reference to limiting discovery: "On such a motion, the court may require the moving party to pay all or part or all of the reasonable expenses incurred by the responding party, as appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)." The third would add a new paragraph following the second paragraph of Rule 34(b): "On motion by the responding party under Rule 26(c), the court shall limit the discovery in accordance with Rule 26(b)(2)(i), (ii), or (iii), or require the party submitting the request to pay part or all of the reasonable expenses incurred by the responding party."

Each alternative repeats Rule 26(b)(2), a problem not encountered when cost-bearing is incorporated in Rule 26(b)(2), and in the same way each might seem to negate by implication the exercise of the same power as to other forms of discovery.

A preference was expressed for the third alternative because it expressly ties cost-bearing to Rule 26(c) as well as Rule 26(b)(2). It requires a Rule 26(c) motion, freeing the issue from confusion with the motion-to-compel practice. The Committee Note can say that there is no negative implication as to cost-bearing incident to other forms of discovery. And it also can note that the explicit provision has been adopted in Rule 34 because document production has been the most frequent source of problems.

It was suggested that the drafting would better show that the court can both deny some part of the document demand and order cost-bearing as to other parts if it read: "the court shall, in accordance with Rule 26(b)(2)(i), (ii), or (iii), limit the discovery or require the demanding party to pay * * *."

Another suggestion was that the first two alternatives could tie the cost-bearing remedy to the objection process in Rule 34(b). The second paragraph requires a responding party to state that inspection will be permitted or to object, and requires that the reasons for objections be stated. It should be possible to draft the rule to implement the general discovery-enforcement structure that requires the demanding party to assume the moving burden. This can be accomplished by providing that one ground for objection is that discovery should be limited, or cost-bearing ordered, under Rule 26(b)(2). This approach has the advantage of incorporating the explicit Rule 37(a) motion procedure. The demanding party must first attempt to confer with the objecting party, and then must move to compel. An approximate version might be:

> * * * The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. An objection may include an assertion that discovery should be denied under Rule 26(b)(2) or that the principles of Rule 26(b)(2)(i), (ii), or (iii) [and Rule 26(c)] should be implemented by an order that the party submitting the request pay part or all of the reasonable expenses incurred by the objecting party. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

The Committee Note would make it clear that the court can order production of some items, bar production of others, and condition production of still others on payment of part or all of the reasonable production costs.

It was moved that the cost-bearing principle be implemented by adding a new third paragraph to Rule 34(b), beginning: "On such a motion, or on motion by the responding party under Rule 26(c), the court shall, in accordance with Rule 26(b)(2)(i), (ii), or (iii), limit the discovery or require the requesting party to pay part or all of the reasonable expenses incurred by the responding party." The Note could say that the authority exists now; it is not intended to imply any limit on the same power as to other discovery methods. It might be illustrated by referring to distant depositions, or depositions beyond the number that seem reasonable for the case. This emphasis will protect against the fear that because defendants often have to bear the burden of document discovery, this proposal

is intended primarily to protect defendants. But it should be emphasized that special problems seem to arise in "big documents cases."

The Committee voted unanimously to adopt a Rule 34 cost-bearing principle, on terms to be drafted by the Reporters and submitted to the Committee for review by mid-April.

Discovery Moratorium

Rule 26(d) was amended in 1993 to provide that a party may not seek discovery from any source until the parties have met and conferred as required by Rule 26(f). The proposal to reduce the scope of initial disclosure to supporting information raises the question whether the moratorium should be abandoned. There is less reason to defer the beginning of discovery as initial disclosure provides less of the information that inevitably will be sought. Deletion of the moratorium would require amendment of Rule 26(d), and changes in Rules 30, 33, 34, and 36 that would restore the timing provisions deleted by the 1993 amendments. The subcommittee seemed to favor this approach at the Santa Barbara meeting. But the Rule 26(f) conference remains, and the purpose of the conference in part is to discuss and agree on a discovery plan. It does not seem to make much sense to allow what may be substantial discovery before the parties ever begin to confer and plan.

Support for abandoning the moratorium was found in the lengthy delays that may arise from postponed service and then awaiting the Rule 26(f) conference and scheduling conference. Courts should not deceive themselves as to the extent of influence they exert through the scheduling conference. Discovery continues to be managed by the lawyers, for the most part without court supervision. The moratorium made sense as a quid pro quo for initial disclosure of adverse information. But if initial disclosure is reduced to self-serving information, it becomes more important to get discovery launched as soon as possible. The moratorium has value as a means of delaying discovery while motions to dismiss are considered, but more direct means are better for this purpose. The moratorium may discourage plaintiffs from starting out fast; deleting it may balance the package of discovery changes.

Support for retaining the moratorium was found in the integral role it plays in the scheme of disclosure and Rule 26(f) conference. "If we are to have disclosure at all, there should not be willy-nilly discovery first." Lawyers can stipulate out of the moratorium if prompt discovery is needed, or simply accelerate the Rule 26(f) conference.

The view was expressed that it really makes no sense to retain any form of initial disclosure and Rule 26(f) conference if they are to be preceded by substantial discovery. The disclosure of supporting information will seldom have any function in this setting. And early discovery would defeat the very purposes of a conference designed to discuss settlement, focus the issues for discovery beyond the often vague contours of notice pleading, and develop a plan for coordinated and effective discovery.

A motion to retain the Rule 26(d) discovery moratorium was adopted by unanimous vote.

Time Limit on Document Production

The subcommittee noted that proposals have been made to establish a presumptive backward time limit for the scope of document production. The nature of the proposals is illustrated by a

formulation that would require that good cause be shown to secure production of documents created more than seven years before the conduct, transaction, or occurrence giving rise to the litigation. Because these proposals came to the subcommittee after its January meeting, it offered no recommendation.

The concept of establishing a presumptive temporal limit on the scope of document production was found interesting. It was agreed that any specific time period chosen for a rule must be, in one sense, arbitrary. There are no data to support a seven-year period rather than a period of six years or eight years. Nor are there data to support distinctions among different types of litigation, to suggest, for example, that employment discrimination cases deserve a longer or shorter presumptive limit than product liability cases.

The Committee agreed that more work must be done to develop and support this concept before a decision can be made whether to recommend it for adoption. The question was remanded to the subcommittee for further work.

Discovery Time Cut-Off

Following the recommendations of the Judicial Conference in reporting on experience under the Civil Justice Reform Act, the Committee has studied the desirability of revising the rules that relate to the time allowed to complete discovery and to the process of setting a trial date. Rule 16(b) now requires that the scheduling order set a time for completing discovery, and provides that the scheduling order may set the date for trial. The district court has ample power to begin case management by setting firm dates for concluding discovery and for trial. The question is whether the rules should be made more specific, setting out a presumptive period for completing discovery and a presumptive trial date.

The RAND report on CJRA experience emphasized that time to disposition can be reduced, without increasing costs, by a combination of early judicial management that sets an early discovery cut-off and an early and firm trial date. Case-management practices differ among courts, however, raising the question whether the national rules should specify periods for completing discovery and trial dates. Any specifications must necessarily be presumptive only, not mandatory — some cases present special needs that cannot be met within the periods that are satisfactory for most cases, and some courts have docket problems that preclude adherence to a rigid trial schedule set by national mandate.

The subcommittee report began with the suggestion that the enduring problem is whether to "decouple" discovery completion from trial date. The Committee has recognized throughout its study of these questions that it is not feasible to set even a presumptive trial date by national rule. Some federal districts are burdened with heavy criminal dockets that, in part because of speedy trial requirements, would make unrealistic any attempt to set a firm trial date during the early stages of a civil action. But it is agreed on all sides that it would be a mistake to mandate a discovery cut-off without any reference to a realistic trial date. A lengthy period between the conclusion of discovery and trial is regarded as at best costly, and at worst as an impediment to effective trial.

With this caveat, the subcommittee presented three options. One does not address trial dates, but directs that discovery be completed within a specified number of days. This proposal does not

advance any recommendation for the actual number of days to be specified; the FJC study finds that 6 months — 180 days — is the mode. The second proposal requires that the Rule 16(b) scheduling order set a date for trial — the first alternative in this proposal would specify a still undetermined number of days after the date set to complete discovery, while the second alternative would only require that the trial date be set a reasonable time after the date set to complete discovery. The third proposal simply requires that the scheduling order set a date for trial.

Discussion began with the observation that additional rules may not be the best approach to these problems. The issue is one of case management. The Committee on Court Administration and Case Management and the Federal Judicial Center can work to foster sound case-management practices, including early discovery cut-offs and early and firm trial dates.

Thomas Willging reported that the FJC study could not duplicate the RAND findings on the effect of a discovery cut-off. No correlation with cost or delay was shown by this study.

It was observed that for many years, lawyers and judges have believed that cost and delay can be reduced when the court sets an early trial date "carved in stone." The difficulty is that some courts simply are not in a position to do this.

Doubt was expressed as to the universality of the benefits gained by early and firm trial dates. In some complex cases, lawyers find that they need to gather information through discovery before they are able to make realistic assessments about the best means of case management and possible settlement. The Rule 16(b) conference is too early for realistic consideration of a trial date for these cases. Other types of cases may present different problems. In personal-injury actions, for example, trial should not be scheduled until the plaintiff's condition has stabilized. And for the same reasons, it would be wrong to cut off discovery before the condition is stabilized.

The impact of heavy criminal dockets was again noted. And it was stated that it is difficult to make accurate early estimates of the time needed to decide the dispositive motions that commonly follow completion of discovery. Some courts, in addition, find it helpful to order alternate dispute resolution efforts when a case is not fully resolved on post-discovery motions. Again, the time required cannot be predicted at the outset of the action.

A more direct view was that a national rule directing that a firm trial date be set in all cases would be a fiction in many courts. It would be a mistake to mandate something that cannot be done.

These concerns led back to the view that it is irrational to establish a specified time for completing discovery that is severed from a firm trial date. The best that might be done is to require an "on-or-about" trial date; the Committee should consider whether this alternative would have sufficient benefit to justify its vagueness. Or Rule 16(b) might be amended to require that a trial date be set at the beginning when it is feasible to do so, but this would be a minor variation on the present Rule 16(b)(5) provision that makes the trial date a permissive scheduling-conference subject.

Discussion turned to the proposition that there may be more than one pretrial conference, particularly in complex cases. Some judges find it helpful to schedule a routine second conference just to make sure that the lawyers do not forget about a case in the press of other work. Cases that have multiple Rule 16 conferences are particularly suited for working toward a firm trial date after

the first conference.

The Committee concluded that present Rule 16 should not be amended. The most effective response to the findings in the RAND report — remembering that the FJC study could not replicate them — is to encourage the Committee on Court Administration and Case Management and the Federal Judicial Center to emphasize in training programs and other efforts the values of early case management, early discovery cut-offs, and early and firm trial dates.

Privilege Waiver

The subcommittee has received repeated suggestions that great costs are incurred to avoid inadvertent waiver of privileges in cases that involve production of vast numbers of documents. Some lawyers have noted that they achieve an uncertain measure of protection by stipulating to protective orders that allow preliminary examination of responsive documents on terms that provide the preliminary examination is not production of the documents and that the producing party does not waive any privilege. The examining party then specifies the documents it wants to have produced, and the ordinary privilege-assertion process is resumed. This process can substantially reduce the costs of reviewing documents that are not obviously privileged. The need for such review is that inadvertent disclosure of a document that proves privileged on detailed factual inquiry and fine legal analysis may waive the privilege as to many documents that obviously are privileged. This process seems to work when the parties trust each other. But it is not at all clear that a stipulation of the parties can protect against waiver arguments by nonparties.

The subcommittee prepared a model for consideration. The model, with a variation advanced in a footnote, would establish a new mode of responding to a Rule 34 request to produce. Rather than produce or object, the response would be to allow initial examination. The responding party could withhold from the initial examination any documents within the scope of the request, complying with the "privilege log" requirements of Rule 26(b)(5). Allowing initial examination would not waive any privilege. After the initial examination, the requesting party could specify the documents still requested. The ordinary Rule 34 process would resume at that point.

It is not clear how many lawyers believe that a process like this would be useful. Some support was offered at the Boston College conference, and substantial interest was expressed at the earlier San Francisco meeting. Strong interest was shown at the Litigation Section summer 1997 meeting. Even if stipulated protective orders work to reduce the costs of document review, they do not provide clear protection.

Skepticism was expressed on various grounds. One view was that no able lawyer would allow a preliminary examination without undertaking a review as careful as the review required to respond directly to a demand to produce. Another view is that there are doubts whether even a preliminary examination rule designed to limit the effects of a federal procedure is within the scope of the Enabling Act. 28 U.S.C. § 2074(b) provides that rules that modify a privilege can take effect only if approved by Act of Congress. Many privilege issues in federal court are governed by state law; there may be "Erie" questions about a federal rule that mollifies a state waiver rule.

The committee agreed that the subcommittee should study these issues further.

Number of Depositions

Rule 30(a)(2)(A) was added in 1993 to establish a presumptive limit on the number of depositions. Court permission must be obtained if a proposed deposition would result in more than 10 depositions being taken under Rule 30 or Rule 31 by plaintiffs, by defendants, or by third-party defendants. The FJC study shows that most cases involve far fewer depositions than this. If most cases need less discovery, it may be desirable to reduce the presumptive number. The purpose would be to increase the number of cases that are forced into judicial discovery management. This would enhance the model that looks toward a three-stage discovery procedure: initial disclosure is followed by party-managed discovery within a reasonably narrow core that meets the needs of most cases. More burdensome discovery is to be controlled by the court as well as the parties, to protect against the occasional excesses that continue to give rise to dissatisfaction with the discovery system.

Despite the attraction of this possibility, it was noted that there has not been any protest that 10 depositions "per side" is too many. There are significant numbers of cases that deserve this number. The fact that most cases are completed with far fewer depositions tends to support the conclusion that the stated limit has not encouraged parties to take more depositions than they otherwise would.

It was agreed that no action should be taken now to limit the number of depositions set in Rule 30(a)(2)(A) and the parallel provision in Rule 31(a)(2)(A).

Rule 26(c)

The possibility of amending Rule 26(c) has been on the Committee agenda for several years. The topic first arose in response to bills that reflected concern that discovery protective orders may prevent public access to information that is important to protect public health and safety. Throughout the period of Committee study and public reactions to published proposals, the Committee was unable to find any persuasive evidence that present practice in fact defeats public access to such information. The proposal published in September, 1995, was designed to capture the good practices that are generally followed so as to ensure that all courts do the same wise things. The power to modify or dissolve a protective order was made explicit. It was provided that modification or dissolution could be sought by a nonparty, and that the test for intervention for this purpose does not require the showings required to intervene as a party. Modification or dissolution would be available to protect public interests, including public health or safety, and also would be available to relieve the burden of duplicating discovery efforts in separate litigation. After considering the testimony and comments on this proposal, the Committee concluded that there was no urgent need for action and carried the proposal forward for further consideration as part of the broad discovery project.

As the discovery project has unfolded, the Committee again has found that richly experienced lawyers, from all fields of practice, find no need to change present protective-order practice. At the Boston College conference, plaintiff and defense lawyers alike seemed to agree on this.

Further discussion expressed concern that when the Judicial Conference returned this proposal for further study, some members may have misunderstood its reach and effect. Even that possibility was not found a ground for renewing the proposal, however, given the lack of apparent

need for present amendments. The Committee voted unanimously to terminate consideration of the 1995 Rule 26(c) proposal.

Although the Committee does not believe that there is any need to change protective-order practice, the Committee recognizes that some members of Congress believe there is a need. Legislative proposals will continue. As with other matters, there is reason to regret the difficulty of integrating the benefits of the Enabling Act process with the strengths and direct-action capacities of the legislative process. The Committee remains willing to study these questions further if new information becomes available — remembering that the Federal Judicial Center did a sophisticated and helpful study at the Committee's request — and to provide support by other means if Congress finds that desirable.

Technical Amendments

Subcommittee recommendations for technical amendments in the discovery rules were adopted without extensive discussion.

Rule 30(d)(1) would be amended to delete the potentially confusing reference to "evidence," and to make it clear that nonparties as well as parties are bound by the rules limiting instructions not to answer: "(1) Any objection ~~to evidence~~ during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A person ~~party~~ may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ~~on evidence~~ directed by the court, or to present a motion under paragraph (3).

Rule 30(d)(2) would be amended to conform to the proposal to limit the time allowed for taking a deposition. The second sentence would also be divided out, creating a new paragraph (3), and revised to make it clear that sanctions may be imposed for any impediment, delay, or conduct that frustrates fair examination of the deponent.

Rule 37(c)(1) would be revised to apply sanctions not only to a failure to supplement initial disclosures as required by Rule 26(e)(1), but also to a failure to supplement a discovery response as required by Rule 26(e)(2).

A number of discovery rules will be amended to conform to the provisions that reestablish national uniformity, deleting the option to depart by local rule.

It was decided not to do anything about the potential uncertainty created by the 1993 amendments as to discovery of liability insurance. Until 1993, the rules expressly included liability insurance within the scope of discovery. This provision was added because it was not obvious that insurance coverage is relevant to the subject matter of an action or may lead to the discovery of admissible evidence. The 1993 amendments made insurance coverage one of the items covered by initial disclosure and deleted the scope-of-discovery provision. The uncertainty arises in cases that are exempted from initial disclosure. Under the 1993 framework, the uncertainty arises most obviously in districts that have opted out of initial disclosure by local rule. Under the proposed amendments, the uncertainty will arise most obviously in cases that are exempted from initial disclosure by the "low-end" exemption. There is no indication, however, that this potential uncertainty has created any difficulty. The earlier rule made it clear that liability insurance coverage

is within the scope of discovery. The continuing provision for initial disclosure establishes the same terms and limits, and inevitably must be followed in defining the scope of discovery for cases exempted from initial disclosure. It does not seem worth the complication to craft a rule that removes insurance coverage from the disclosure exemptions that otherwise might apply.

Rule 5(d)

In 1978, the Advisory Committee published a proposal to amend Rule 5(d) to bar routine filing of discovery materials. The published proposal read:

> **(d) Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but, unless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examination and interrogatories and requests for admission and the answers thereto need not be filed unless and until they are used in the proceedings.

This proposal was put aside in favor of present Rule 5(d), which provides that the court may order that discovery materials not be filed. The Ninth Circuit Judicial Council study of local rules found that many districts in the Ninth Circuit have local rules that bar filing. Many other districts around the country have similar rules. The Ninth Circuit Judicial Council has recommended that Rule 5(d) be amended to allow adoption of such local rules, which now seem invalid because inconsistent with Rule 5(d).

The 1978 proposal was supported by cost concerns. One set of costs is incurred by courts that must find means of storing everything that is filed. Another set of costs is incurred by the parties who must pay for copies to be filed. It was withdrawn, however, in face of expressed concerns that nonfiling defeats public access to information that may be of public interest. Now a legion of local rules have done what the Advisory Committee was not willing to do twenty years ago. This widespread experience with the costs of filing may of itself provide strong support for reconsidering the 1978 proposal.

In addition, there are particular difficulties caused by developing discovery technology. Rule 30(f)(1) has been amended to provide that the officer presiding at a deposition shall either file the transcription or recording with the court, or shall "send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it * * *." This provision seems inconsistent with Rule 5(d). The reference to "recording" obviously reflects burgeoning audiotape and videotape means of recording depositions. The burdens that would be imposed on district courts obliged to make such recordings available for public "inspection" could be considerable.

The obvious direct response to the Ninth Circuit Judicial Council recommendation would be to propose that Rule 5(d) authorize local rules that bar filing. But there is no apparent reason why local variations are appropriate. There should be a uniform national rule, one way or the other. A motion was made to propose adoption of the 1978 proposal.

Discussion of the 1978 proposal noted that it would provide for filing when discovery

materials "are used in the proceedings," so that they must be filed if used to support summary judgment or other motions. It says only that materials "need not" be filed, so that a party who prefers to file may do so. Perhaps most important, the proposal reflects what actually is being done. Even apart from local rules or specific court orders, there are indications that the apparent filing requirement for deposition transcripts is routinely ignored by many lawyers in many districts — perhaps with the support of amended Rule 30(f)(1).

A motion to propose the 1978 proposal was adopted by unanimous vote.

Discussion of the Discovery Subcommittee report concluded with thanks and applause for the Subcommittee, and particularly for Judge Levi as chair and Professor Marcus as special reporter.

Federal Rules of Attorney Conduct

Professor Coquillette introduced the Standing Committee's study of the rules that govern attorney conduct in federal courts. The origins lie in the 1987-1988 concern of Congress with local rules, which led to legislation tightening the rules that limit local rules. Congress saw local rules not only as confusing to lawyers, but also as circumventing the role of Congress and the Enabling Act process.

The Local Rules Project helped to reduce the number of local rules. Then the Civil Justice Reform Act fostered a proliferation of local practices. Now the pendulum is again swinging the other way — as shown by Judge Wilson's proposal at the last Standing Committee meeting that an absolute number limit should be imposed on local rules. The American Bar Association Litigation Section has launched a local-rules project to study the problems.

There are many local rules on attorney conduct. Many of them are inconsistent. This topic was viewed as too sensitive to approach during the first stages of the Local Rules Project. The early stages focused on numbering systems and eliminating local rules that are inconsistent with the national rules.

In 1995, acting under the Standing Committee mandate to maintain consistency, Judge Stotler asked Professor Coquillette to undertake serious studies of the rules regulating attorney conduct. The resulting studies are brought together in the Working Papers on the rules of attorney conduct. They show a wide variety of approaches among the different districts. One federal district has adopted the 1909 ABA Canons of Professional Ethics. Some follow the Code, including districts in states that have adopted the Model Rules. The opposite phenomenon also occurs. The District of Delaware, for example, has adopted the Model Rules, while Delaware adheres to the Code. Some districts have no rules at all. Some of the no-rules districts look to both the Code and Rules for guidance. One district has its own unique set of rules. The Federal Judicial Center study shows that these differences in approach do in fact create problems.

The Standing Committee sponsored two conferences of experts on professional responsibility. They found four options: (1) Do nothing. Continue to leave these matters to control by local rule. (2) Establish a uniform federal rule that adopts for each district the current professional responsibility rules of the state embracing the district. This "dynamic conformity" model was favored by 60% of chief judges in a FJC survey. (3) Adhere to the dynamic conformity

model for most issues, but establish uniform federal rules governing the core topics that occur most frequently and involve the most important federal interests. Such topics might include conflicts of interest, candor to the tribunal, the lawyer as witness, and other matters. (4) Adopt a complete system of independent federal rules.

The experts did not favor the status quo. "Chaos is growing." There are more and more local rules, and they are increasingly inconsistent. Indeed the Court Administration and Case Management Committee has recently invited the districts to create local rules to govern the conduct of lawyers used as "neutrals" in ADR systems, without suggesting model rules that might foster some measure of uniformity. The Department of Justice, however, would prefer the status quo to adoption of bad national rules.

The Conference of Chief Justices prefers the dynamic conformity model.

The Department of Justice, and 30% of the chief judges in the FJC study, prefer the third approach. The Department of Justice believes that its interests require uniform rules that meet its needs on some topics.

The American Bar Association agrees that something should be done; for now, it prefers the core rules approach.

No one favors adoption of a complete body of independent federal rules. In part this position rests on the belief that it would be a mistake to create independent federal enforcement systems.

The Standing Committee wants the advisory committees to help with the broad issues of policy: should any federal rules be adopted as a freestanding set of Federal Rules of Attorney Conduct, or should they be incorporated in each of the several sets of rules? Civil Rule 83, for example, could be amended to incorporate federal rules that could be adopted as an appendix to Rule 83. So far, virtually everyone seems to favor a freestanding set of rules.

A second policy issue requires identification of the mechanism for developing and reviewing proposed federal rules. For the moment, the Appellate Rules Advisory Committee has, with Appellate Rule 46, the only uniform national rule. Rule 46, however, is couched in terms of conduct unbecoming a lawyer; the vagueness of this term in turn has spawned many divergent local appellate rules. The Advisory Committee believes that there are few attorney-conduct problems in the appellate courts, and prefers that other committees take the lead. The Bankruptcy Rules Committee believes that bankruptcy practice should be governed by unique rules. The Bankruptcy Code has some statutory provisions governing these matters. Bankruptcy practice, moreover, often involves cases with hundreds or even thousands of claimants-parties; the conflict-of-interest rules that work for ordinary litigation seem inappropriate for bankruptcy administration. Professor Coquillette has recommended that the Bankruptcy Rules Committee be provided the opportunity to develop proposed rules for bankruptcy lawyers. The Evidence Rules Committee does not presently believe that it has much of an independent stake in these issues. That leaves the Criminal and Civil Rules Advisory Committees as the groups that may have the most immediate interests. The question is whether they should each act independently, with such contributions as might be made by the other advisory committees, or whether an ad hoc advisory committee should be formed.

The third policy question involves the choices sketched above: should anything be done at all? If so, should the model be dynamic conformity or a core of federal rules that leaves other matters to dynamic conformity?

The ten core rules that have been drafted provide a concrete image of what the core-rule approach might be. The system has an attractive simplicity. The federal rules would be provided to each lawyer on admission to practice in a federal court. Rule 1 establishes dynamic conformity to local state law for everything not covered by Rules 2 to 10. Rules 2 to 10 provide the core. They cover approximately 85% of the issues that actually arise in federal cases. They are, however, a relatively minor portion of a complete body of rules; creation of a complete body of federal rules would add great length and complexity to reach only a small number of additional cases. Rules 2 through 9 are tightly geared to the Model Rules. This drafting choice has several advantages. It avoids the need for enormous effort by adopting a model that has been carefully worked out. The model will establish national uniformity for the federal courts, but at the same time will make federal law uniform with the law in many states. Rule 10, on the other hand, is independent of the present Model Rules. It establishes variations from Model Rule 4.2, which governs contact with represented persons. The present Rule 10 draft embodies the current discussion draft that seeks to resolve disagreement between the Department of Justice and the Conference of Chief Justices on this topic. If agreement can be reached on this issue, it will establish support for the core-federal-rules approach from the American Bar Association, the Conference of Chief Justices, and the Department of Justice.

Following this introduction, it was observed that the Advisory Committee has favored an educational approach in dealing with topics this important and complex. Professional responsibility matters have generated enormous bodies of expert thought. Bringing the Civil Rules Committee to the point of useful deliberation on the substance of specific rules will require real effort. The Committee should be able to think fruitfully about the broad issues of approach sketched by the Standing Committee. It will be much more difficult to provide cogent advice on something like the "Rule 4.2 - Rule 10" issues, which invoke competition between the need to protect genuine attorney-client relationships and the needs of law enforcement in settings that may involve attenuated attorney-client relationships.

It was asked whether independent federal rules would increase the risk that a lawyer would be punished twice for the same conduct, once in federal court and once in state court. It was noted that of course a federal court must determine for itself whether a lawyer can continue to practice in the court, and whether some sanction other than revocation should occur; and of course the licensing state has an independent interest in regulating its lawyers. This is true whether or not there are independent federal rules. It can happen that a federal court will impose a sanction and state officials will not, or that state officials will punish conduct that the federal court does not punish.

One Committee member suggested that it makes no sense to incorporate federal rules of attorney conduct into the civil rules or any other discrete set of rules. The rules will apply across the full range of attorney conduct and should be freestanding. He also suggested that it would be better to create a single ad hoc committee with representatives from interested advisory committees than to burden each advisory committee agenda with these questions.

It was asked what agencies would be responsible for enforcement if core federal rules were

adopted. Professor Coquillette answered that federal courts will continue to rely in large part on state agencies. Now federal courts often refer problems to state agencies even when state rules are quite different from the local federal rules. A core-rule approach would reduce the problems because some topics would be governed directly by state law, while federal law would be identical or nearly identical to state law in many states. Simple dynamic conformity of course would eliminate the problem entirely — state officials would be asked to enforce state rules. At the same time, federal courts almost inevitably would have their own procedures for determining whether to suspend or revoke the privilege to appear in federal court. "Study 7" in the work papers is consistent with this expectation.

The core-rule approach was challenged as involving problems of federalism. Much of the impetus for nationally uniform core rules derives from the "Rule 4.2" position of the Department of Justice. The Department wants to immunize its attorneys from state enforcement, but state enforcement is the norm for matters of attorney conduct. And these matters are further complicated if there is a federal rule that favors criminal investigators — joint task forces are common, and the federal rule will encourage the state participants to relinquish to the federal participants investigation techniques that are forbidden to the state participants.

The Conference of Chief Justices is concerned that the core rule approach, by superseding local rules, "defederalizes" the traditional role of the states.

This federalism concern was balanced by the observation that many districts now have rules that resemble the proposed core rules. Others have rules that depart further from state practice. The core rules would make for a uniform national law that presents a political problem more in dealing with the attachments of district courts to their local rules than in dealing with state interests. The core federal rules system would bring federal law closer to state practice, not draw it further away.

Returning to the process question, it was suggested that an ad hoc advisory committee, established with perhaps 2 representatives from each of the interested advisory committees, would make sense. It would be possible for the Civil and Criminal Rules Advisory Committees to cooperate in separate efforts, but the task would be a heavy load on their dockets. Probably it would be a mistake for each advisory committee simply to abdicate any interest in these problems.

Concern was expressed about the seeming willingness to allow the bankruptcy courts to operate under separate rules. There are, to be sure, special problems in bankruptcy practice. Ordinary conflict-of-interest rules may make it difficult to provide non-conflicted representation for all creditors. But bankruptcy matters often return to the district court; it would be better to have a single set of rules for the district courts. The American Law Institute considered requests for special bankruptcy rules in developing the Restatement Third of the Law of Lawyering, and put these issues aside. To the extent that special rules are required for bankruptcy, they should be incorporated directly into the core rules. Any other approach will detract from the moral force of the core rules. Special treatment may indeed be deserved for some bankruptcy issues. One illustration is provided by a local rule that allows a person initially appointed as mediator to undertake representation of a party if the court approves — the rule seems necessary because it may be impossible to foresee the parties that may become involved at the time bankruptcy proceedings begin.

Strong support for the core-rule approach was voiced from the perspective of an attorney who regularly practices in many different federal districts. A single and uniform set of federal rules would be very helpful. The local rules are not good. And it would be a mistake to incorporate these rules separately into the different bodies of rules. They should be a single, stand-alone set of Federal Rules of Attorney Conduct.

Discussion of an emerging preference for the core federal rules approach, adopted as a formally separate set of Federal Rules of Attorney Conduct, led to reconsideration of the "Rule 4.2 - Rule 10" problem. The Rule 4.2 problem was seen as still dynamic, and such an important element of the core rules that approval of this approach might seem premature. Support also was voiced for the simple adoption of local state rules — the core approach still omits much more of the Model Rules than it embraces. It is too early to make the choice between simple dynamic conformity and adoption of core rules to supplement dynamic conformity on issues outside the core rules.

Professor Coquillette summarized the issues by observing that the Standing Committee does not want this Committee to remain aloof from the attorney-conduct rules problems. Participation through an ad hoc committee would be desirable if that is the most effective means open to this Committee. Time pressure is not intense. The Bankruptcy Rules Committee will need time, and should be given at least a year. No final answers should be reached until the Bankruptcy Rules Committee has reached its own recommendations. The American Bar Association, moreover, has established an Ethics 2000 Committee that will consider state-federal issues.

A motion to recommend adoption of freestanding rules, and to approve participation by naming delegates to an ad hoc committee, led — without a vote — to a consensus conclusion on several points. Any federal rule or rules should be adopted in a form that is independent of any of the existing sets of rules. The Committee does not want to choose yet between simple conformity to local state practice and conformity supplemented by specific federal rules on core subjects. There is a sense that any special rules for bankruptcy cases should be incorporated into the body of rules adopted for all other proceedings. Participation through an ad hoc committee seems desirable. There is no wish to take sides on the "Rule 4.2" debate.

Service and Answer Time in Actions Against Federal Employees

The Department of Justice has proposed amendments to Rules 4(i)(2) and 12(a)(3) for actions brought against an officer or employee of the United States sued in an individual capacity. Rule 4(i)(2) would be amended to require service on the United States as well as the individual employee. Rule 12(a)(3) would be amended to allow 60 days to answer.

These questions arise when a United States officer or employee is sued in an individual capacity for acts or omissions connected with the duties of office or employment. The United States frequently provides representation for the defendant, and in appropriate circumstances may be substituted as the defendant. It is important that it be served at the outset, so that it knows of the litigation and can decide what course to follow. It also is important that sufficient time be allowed for these purposes; the 60-day period allowed in actions brought against the United States, or against an officer in an official capacity, is appropriate.

Two questions were addressed: Whether these changes are desirable, and which of several

alternative formulas should be used to describe the individual-capacity claims reached by these changes.

It was asked what special interests of the federal government justify according treatment not offered to state governments, or to other large organizations. Many actions are brought against state employees on claims that arise out of their state employment, and states often have interests that parallel the interests asserted by the federal government. Many of these actions against federal employees, moreover, are ordinary lawsuits. The underlying conduct and the legal theories are no more complex than those involved in many other actions.

These questions led to the observation that the Civil Rules began with drafting by the Department of Justice, and in the beginning contained many provisions favorable to the United States. Some of these provisions have been diluted or removed over the years. Rule 4(i)(3) has been recently amended to defeat the occasional government practice of seeking dismissal for failure to meet technical requirements for serving multiple government bodies. Some plaintiffs still were losing cases simply because they had not served enough different people. If the proposed changes are adopted, Rule 4(i)(3) should be further amended to ensure that failure to serve the United States under proposed Rule 4(i)(2)(B) does not defeat the claim.

These doubts were met by the observation that in fact the Department of Justice has found that it really needs notice at the beginning and 60 days to answer. That is what it takes to get the job done. The Federal Employees Liability Reform and Compensation Act of 1988 often leads to certification that an employee was acting within the scope of office or employment and substitution of the United States as defendant. The United States needs at least as much time to respond to these cases — the review and certification decision add to the time requirements, and there is no reduction in other time needs.

It also was noted that some federal courts routinely provide that in § 1983 actions against state employees, service must be made on the state attorney general's office, and automatically grant extensions of time to answer.

Turning to drafting questions, it was noted that some means should be found to ensure that the rules reach actions against former employees as well as current employees. It was suggested that thought be given to adding "agents" to the list of defendants, since some government agents are not officers or employees of the United States. It was decided that it is better not to raise the complications that might follow an addition of "agents," at least until some actual problems arise on this score. It was agreed that the Committee Note should point out that the purposes of the rule reach former employees as well as current employees.

The most important drafting question turns on the words used to describe the connection between the claim and federal employment that justifies the requirement of service on the United States and a 60-day answer period. The mere fact that a federal employee is a defendant is not sufficient. Three phrases were proposed: that suit be for acts or omissions "occurring in connection with the performance of duties on behalf of the United States"; "arising out of the course of the United States office or employment"; or "performed in the scope of the office or employment."

Although the "scope of employment" language derives from the Federal Employees Liability Reform and Compensation Act of 1988, it won little support. It was found too narrow, and to risk moving the scope-of-employment determination to the initial stages of the litigation.

Initial support was voiced for the "arising out of the course of the * * * employment" formula. The formula seems borrowed from the common phrases used in workers compensation statutes. But it also is used in a variety of procedural rules — familiar examples include Civil Rules 13(a) and 15(c). It does not require a technical determination of the scope of employment. It has the advantage that it is novel in this setting, and thus can be construed to adapt these rules to the evident lessons of accumulating experience in application.

Support also was voiced for the "connection with the performance of duties" phrase. It is even more obviously open-ended and functional than the "arising out of" phrase. It has the advantage of lacking any obvious analogy to developed areas of technical law, freeing courts and lawyers from the need to articulate the reasons why precedents under compensation laws or other procedure rules may not provide suitable guidance in this setting.

It was asked whether "color of law" should be adopted as the test. An earlier draft was written in terms of acts "under color of federal office or employment." This phrase was rejected because "color of employment" is a new term, and one that might be difficult to cabin. "Color of office" is classically used to include acts made possible by an officer's official position, even though there is no arguable legal justification. Color of employment might be read in similar and perhaps undesirably broad ways. An example was offered of a law-enforcement employee who, while off duty, uses an official badge to perform a robbery.

Further discussion emphasized the difficulty of achieving any perfectly clear language. A deliberately indefinite phrase must be used to support reasonable adaptation to the needs of marginal cases as they may arise. The Committee voted unanimously to adopt "occurring in connection with the performance of duties on behalf of the United States." It also was decided that Rule 4(i)(3) should be amended to ensure that a reasonable time will be allowed to cure failure to serve the United States.

Local Rules

The Standing Committee has asked for consideration of a proposal to amend Rule 83 to provide a uniform effective date for local rules. The draft of Rule 83(a)(1) provided for consideration would read: "A local rule takes effect on ~~the date specified by the district court~~ January 1 of the year following adoption unless the district court specifies an earlier date to meet a[n emergency] {special} need, and remains in effect * * *."

It was suggested that other local rules questions also deserve consideration. The problems caused by local rules might be reduced if requirements of numbering and filing were made conditions on validity. There may be need to determine whether senior judges are included in the "district judges" who are authorized to adopt local rules. Still other issues may arise. Professor Coquillette advised that this Committee need not reach a position in time to report to the June Standing Committee meeting. Further consideration of local rules questions was postponed to the fall meeting.

Copyright Rules of Practice

Judge Niemeyer summarized the proposal to rescind the obsolete Copyright Rules of Practice and to amend Civil Rule 65 to bring copyright impoundment within the general procedures for temporary restraining orders and preliminary injunctions. The Committee has made vigorous efforts to gain advice from intellectual property law experts, and further delay is not indicated by any reason intrinsic to the Committee process. In many ways, the time is long past for removing this embarrassing reminder of superseded statutes and procedures. At least in reported decisions, district courts seem to be acting as the proposed amendments would have them act: they assume that the Copyright Rules are inconsistent with the 1976 Copyright Act, and that due process requires modification of the impoundment procedures they specify. Rule 65 is used for guidance.

Concern has been expressed that the proposed amendments would be inconsistent with obligations imposed by international treaties to provide effective copyright remedies. In fact the proposed amendments would increase effective copyright remedies by providing a secure legal foundation for the practices now followed by district courts in any event. The fact, however, may not fully meet the concerns expressed by members of Congress. Although they understand that these proposals would add strength to domestic enforcement practices, they fear that other countries cannot be made to understand — in part, perhaps, because they may prefer not to understand. New copyright treaties and legislation are under active consideration.

Recognizing the concerns expressed in Congress, and mindful of the importance of cooperating with Congress, the Committee decided to defer further consideration of the Copyright Rules of Practice to the fall meeting. Judge Niemeyer will write to appropriate members of Congress to report this action.

E-Mail Comments on Rules Proposals

The Standing Committee's Subcommittee on Technology has asked the Advisory Comments to comment on a proposal to experiment with e-mail comments on published proposals to amend federal rules of procedure. The Administrative Office has established the technical capability to receive e-mail comments, and would be responsible for forwarding the comments to all advisory committee members. The proposal is that the Administrative Office also would be responsible for acknowledging each comment by e-mail, and would "make available on the Internet a generic explanation of action of the Advisory Committees in response to comments received." Because this is a 2-year experiment to determine how well e-mail comments will work, the advisory committee reporters will be relieved of the ordinary obligation to summarize comments. A reporter who finds new points made in e-mail comments, however, would be expected to point them out in providing summaries of ordinary mail comments.

Discussion of this proposal explored the possibilities of transmitting the comments to advisory committee members by email. These possibilities will be explored.

The Committee approved the recommendation of the Subcommittee on Technology.

Form 2

Form 2 has not been amended to reflect the increase in the amount in controversy required

by § 1332 to establish diversity jurisdiction. The question is whether the form should be changed simply by substituting the current $75,000 amount, or whether it is better to anticipate possible future changes in the amount. It always will be difficult to predict the timing of any legislative changes that may be made, and it is awkward to have forms that are likely to remain behind statutory reality for as long as three years or even more.

It was agreed that Form 2 should be amended to include this language in the statement of diversity jurisdiction: "The matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332 ~~fifty thousand dollars~~."

The Reporter will explore possible means of effecting such technical changes in the forms that do not require the full and lengthy process of the Enabling Act. The Bankruptcy Rules provide more expeditious procedures, and it may be desirable to propose similar provisions for Rule 84.

Rule 65.1

A suggestion to the Committee reflects concern that Rule 65.1 may impose unauthorized duties on district court clerks. Rule 65.1 provides that the surety on a bond given under the rules "submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served." No question has been raised as to the appropriateness of having a court clerk act as agent for the service of process. Confusion may arise, however, from the provisions of 31 U.S.C. § 9306. Section 9306 allows a surety corporation to provide a surety bond outside the state in which it is incorporated or has its principal office only if it "designates a person by written power of attorney to be the resident agent of the corporation for that district." The duties of a resident agent are incompatible with the office of district-court clerk.

The committee agreed that Rule 65.1 does not contemplate appointment of the court clerk as a § 9306 resident agent. The only rule-imposed obligation is the symbolic role as agent for service in the district, coupled with the functional command that notice be sent to the surety. The automatic appointment effected by Rule 65.1 does not satisfy § 9306 requirements, and does not of itself qualify a "foreign" surety corporation to post a surety bond in the district. The surety corporation is responsible for appointing a resident agent, and cannot appoint the district court clerk.

This conclusion seems sufficiently clear to defeat any proposal to amend Rule 65.1.

Rule 51

The Ninth Circuit Judicial Council survey of local rules has found several local rules that authorize a district judge to require submission of proposed jury instructions before trial. These rules seem inconsistent with Rule 51, which provides that requests may be filed "at the close of the evidence or at such earlier time during trial as the court reasonably directs." The Ninth Circuit Judicial Council proposes that Rule 51 be amended to authorize local rules that require earlier submission.

The Committee agreed that there is no reason why this question should be left to local rules,

which will establish nonuniform practices. If earlier submission of requests is a good idea, it should be supported by Rule 51 itself.

It was noted that a proposal to amend Criminal Rule 30 has been published that would provide for instruction requests "at the close of the evidence, or at any earlier time that the court reasonably directs." The Committee Note says: "While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57."

Courts outside the Ninth Circuit also have adopted practices requiring early submission. One judge requires that requests be filed before jury selection, apparently reasoning that this time still is "during trial."

Concern was expressed that new issues frequently arise from trial evidence, and that there should be a right to submit supplemental requests.

Although it is tempting to try to catch up with the Criminal Rules proposal — although a Civil Rules amendment would be starting out a full year behind the Criminal Rules publication — the Committee concluded that the question should be retained for further study. There are many other questions of Rule 51 practice that might be considered to determine whether the Rule should reflect more accurately the many practices that have grown up around its express language. It may be possible to redraft the rule to provide better guidance to parties and courts.

Civil Rule 44

The Evidence Rules Committee has raised the question whether Civil Rule 44 has become redundant to many different provisions of the Evidence Rules. Correspondence between the Reporters has resulted in a recommendation by the Evidence Rules Committee Reporter that there is no present need to consider these questions. This Committee concluded that the topic does not merit study unless the Evidence Rules Committee concludes that further work is appropriate.

42 U.S.C. § 1997e(g)

The Prison Litigation Reform Act of 1995 added a new provision to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e(g). This statute allows a defendant sued by a prisoner under § 1983 or any other federal law to "waive the right to reply" to the action. "Notwithstanding any * * * rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint." Without a "reply," no relief can be granted to the plaintiff. The court can order a reply "if it finds that the plaintiff has a reasonable opportunity to prevail on the merits."

This statute may well supersede provisions in the Civil Rules, most directly Rules 12(a) and 8(d). Rule 12(a) seems to require an answer to the complaint, and Rule 8(d) provides that failure to deny matters alleged in a pleading to which a responsive pleading is required is an admission. It is possible to strain the language of Rule 12(a) to find that there is no inconsistency. But it might be better to amend these rules to reflect clearly the new statute.

It was pointed out that virtually every district has special procedures for dealing with civil actions filed by prisoners, and that there may be no need to add to the complexity created by the new statute and local practices.

It was concluded that the subcommittee charged with reviewing pending docket items should include these questions in its review.

Next Meeting

No firm date was set for the fall meeting. It will be important to select a date that allows the mass torts working group time to prepare a draft report to be considered by this Committee. The date may be set as late as early November.

Adjournment

The meeting adjourned with expressions of great appreciation for the fine support work provided by the Rules Committee Support Office.

Respectfully submitted,

Edward H. Cooper

Reporter

Item 8A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 15, 1998**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 27 and 28, 1998 in Washington, D.C. and took action on a number of proposed amendments. The draft Minutes of that meeting are included at Attachment B. This report addresses matters discussed by the Committee at that meeting. First, the Committee considered public comments on proposed amendments to the following Rules:

- Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment).
- Rule 7. The Indictment and the Information (Conforming Amendment).
- Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.).
- Rule 24(c). Alternate Jurors (Retention During Deliberations).
- Rule 31. Verdict (Conforming Amendment).
- Rule 32. Sentence and Judgment (Conforming Amendment).
- Rule 32.2. Forfeiture Procedures (New Rule).
- Rule 38. Stay of Execution (Conforming Amendment).
- Rule 54. Application and Exception (Conforming Amendment).

As noted in the following discussion, the Advisory Committee proposes that these amendments be approved by the Committee and forwarded to the Judicial Conference.

Second, the Committee has approved amendments to Rules 5(c) which addresses the authority of a magistrate judge to grant a continuance of a preliminary hearing over the objection of a defendant and Rule 24(b) which would equalize the number of peremptory challenges in felony cases at 10 for each side. The Committee recommends, however, that those two rules not be published for public comment at this point.

Third, the Committee is considering proposed amendments to the following rules:

- Rule 10. Arraignment & Rule 43, Presence of Defendant.
- Rule 12.2. Notice of Insanity Defense or Expert Testimony of
- Defendant's Mental Condition .
- Rule 26. Taking of Testimony.
- Rule 32. Sentence and Judgment.
- Rule 32.1. Revocation or Modification of Probation or Supervised
- Release.
- Rule 43. Presence of Defendant.
- Rule 49. Service and Filing of Papers.
- Rules Governing Habeas Corpus Proceedings; Report of Subcommittee.

Finally, the Advisory Committee has several information items to bring to the attention of the Standing Committee.

II. Action Items--Recommendations to Forward Amendments to the Judicial Conference

A. Summary and Recommendations

At its June 1997 meeting, the Standing Committee approved the publication of proposed amendments to nine rules for public comment from the bench and bar. In response, the Advisory Committee received written comments from 24 persons or organizations commenting on all or some of the Committee's proposed amendments to the rules. In addition, the Committee heard the testimony of four witnesses on the proposed amendments to Rules 11 and 32.2.

The Committee has considered those comments and recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmittal to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM--Rule 6. Grand Jury.

The Committee has proposed two amendments to Rule 6. The first, in Rule 6(d) would make provision for interpreters in grand jury deliberations; under the current rule, no persons other than the jurors themselves may be present. As originally drafted by the Advisory Committee, the provision for interpreters would have been extended only to interpreters for deaf persons serving on a grand jury. The Standing Committee, however, believed that the limitation as to the kind of interpreter permitted to be present during grand jury deliberations should be removed in order to provide an opportunity for the widest range of public comment on all the issues raised by the presence of an interpreter during those deliberations. Thus, the published amendment extended to any interpreter who may be necessary to assist a grand juror. While some of those commenting on this proposed amendment believed it would be appropriate to include all interpreters, several commentators correctly noted that the amendment as written would be inconsistent with 28 U.S.C. § 1865(b) which requires that all petit and grand jurors must speak English.

The second amendment would change Rule 6(f) regarding the return of an indictment. Under current practice the entire grand jury is required to return the indictment in open court. The proposed change would permit the grand jury foreperson to return the indictment in open court--on behalf of the grand jury. Of the eleven commentators, only two opposed this change on the general view that it distances the grand jury from the court.

Upon further consideration of the amendments to Rule 6(d), the Committee decided to limit the presence of interpreters to those assisting hearing or speech impaired grand jurors.

Recommendation--The Committee recommends that the amendments to Rule 6, as modified following publication, be approved and forwarded to the Judicial Conference.

2. ACTION ITEM--Rule 7. The Indictment and the Information

The amendment to Rule 7(c)(2), which addresses one aspect of criminal forfeiture, is a conforming amendment reflecting proposed new Rule 32.2. That rule provides comprehensive coverage of forfeiture procedures. The Committee received no comments on the proposed amendment to the rule.

Recommendation--The Committee recommends that the amendment to Rule 7 be approved and forwarded to the Judicial Conference.

3. ACTION ITEM--Rule 11. Pleas.

The proposed amendments to Rule 11 reflect the Committee's discussion over the last year concerning the interplay between the sentencing guidelines and plea agreements and the ability of a defendant to waive any attacks on his or her sentence. Specifically, Rule 11(a) has been changed slightly to conform the definition of organizational defendants. Rule 11(c) would be amended to require the trial court to determine if the defendant understands any provision in the plea agreement waiving the right to appeal or to collaterally attack the sentence. A majority of the commentators, and one witness who testified before the Committee, opposed the change. Their general opposition rests on the argument that the Rule should not in any way reflect the Committee's support of such waivers until the Supreme Court has ruled on the question of whether such waivers are valid. The Committee believed that it was appropriate to recognize what is apparently already taking place in a number of jurisdictions and formally require trial judges in those jurisdictions to question the defendant about whether his or her waiver was made knowingly, voluntarily, and intelligently. The Committee did add a disclaimer to the Committee Note, as suggested by at least one commentator.

The proposed change in Rule 11(e)(1) is intended to distinguish clearly between (e)(1)(B) plea agreements--which are not binding on the court--and (e)(1)(C) agreements--which are binding. Other language has been added to those subdivisions to make it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. The proposed language includes suggested changes by the Subcommittee on Style. The majority of the commentators supported this clarification.

Recommendation--The Committee recommends that the amendments to Rule 11 be approved as published and forwarded to the Judicial Conference.

4. ACTION ITEM--Rule 24(c). Alternate Jurors.

The proposed amendment to Rule 24(c) would permit the trial court to retain alternate jurors--who during the trial have not been selected as substitutes for regular jurors--during the deliberations in case any other regular juror becomes incapacitated and can no longer take part. Although Rule 23 makes provision for returning a verdict with 11 jurors, the Committee believed that the judge should have the discretion in a particular case to retain the alternates, a practice not provided for under the current rule. Most of those commenting on the proposed amendment, supported it. The NADCL and the ABA opposed the change; the former believes that there is no provision for the court to make any substitutions of jurors after deliberations begin. The ABA opposes the amendment because it believes that it will create an unnecessary risk that jurors will decide the case on something less than a thorough evaluation of the evidence. On the other hand, the Magistrate Judges Association supports the change. After considering the comments, the Committee decided to forward the rule with no changes to the published version.

Recommendation--The Committee recommends that the amendment to Rule 24(c) be approved and forwarded to the Judicial Conference.

5. ACTION ITEM--Rule 31. Verdict.

The proposed amendment to Rule 31 deletes subdivision (e) which related to the requirement that the jury return a special verdict regarding criminal forfeiture. The amendment conforms the rule to proposed new Rule 32.2 which provides comprehensive guidance on criminal forfeitures. The Committee received no comments on this proposed change.

Recommendation--The Committee recommends that the amendment to Rule 31 be approved and forwarded to the Judicial Conference.

6. ACTION ITEM--Rule 32. Sentence and Judgment.

The proposed amendment to Rule 32(d), which deals with criminal forfeiture, conforms that provision to proposed new Rule 32.2 which provides

comprehensive guidance on forfeiture procedures. The Committee received no comments on this proposed amendment.

Recommendation--The Committee recommends that the amendment to Rule 32 be approved and forwarded to the Judicial Conference.

7. ACTION ITEM--Rule 32.2. Forfeiture Procedures.

The Committee proposes adoption of a new rule dedicated solely to the question of forfeiture proceedings. Over the last several years the Committee has discussed the jury's role in criminal forfeiture. Under existing rules provisions, when a verdict of guilty is returned on any substantive count on which the government alleges that property may be forfeited, the jury is asked to decide questions of ownership or property interests vis a vis the defendant(s). However, in *Libretti v. United States*, 116 S.Ct. 356 (1995), the Supreme Court indicated that criminal forfeiture constitutes an aspect of the sentence imposed in the case and that the defendant has no constitutional right to have a jury decide any part of the sentence. Accordingly, the Department of Justice recommended adoption of a rule which would leave the issue of criminal forfeiture to the court. In reviewing the various existing rules provisions dealing with criminal forfeiture, the Committee finally settled on proposing one new rule. The adoption of this new rule would require amendments to Rules 7(c)(2), 31(e), 32(d)(2), *supra,* and an amendment to Rule 38(e), *infra.*

The Committee received only six written comments and most of those supported the change. The NADCL adamantly opposes the proposed rule, and provided two witnesses who testified before the Committee. Their key point is that the new rule abrogates the critical right to a jury trial. Under current Rule 31(e), a jury is required to return a special verdict which determines the extent of the defendant's interest in property to be forfeited; and the rules of evidence apply at that proceeding. Under the new rule, the jury's role would be eliminated and the court would initially decide whether the defendant has an interest in the property. In a later proceeding the court would resolve any third party claims to the property subject to forfeiture. A witness for the Department of Justice pointed out that after the Supreme Court's decision is *Libretti*, supra, forfeiture proceedings are a part of sentencing, a matter to be decided by the trial judge.

After reviewing the comments, the Committee recognized that it can be burdensome to the jury which has just returned a verdict following a long trial involving difficult deliberations, to be informed that their task is not yet finished and that they must next decide whether certain property may be forfeited. The

Committee learned that probably as a result, most defendants waive the right to have the jury decide the issue.

After discussion and consideration of the comments and testimony, the Committee made several clarifying changes to the rule regarding (1) the obligation of the trial judge to determine the extent of the defendant's interest in the property to be forfeited, (2) the fact that the ancillary proceeding is not a part of sentencing, and (3) the procedures to be used if the government wishes to use "substitute" property as provided by statute, and procedures to be used if property which was originally part of the order of forfeiture is subsequently discovered.

Recommendation--The Committee recommends that the amendment to Rule 32.2 be approved as amended and forwarded to the Judicial Conference.

8. ACTION ITEM--Rule 38. Stay of Execution.

The amendment to Rule 38 (e) is a technical, conforming, amendment resulting from proposed new Rule 32.2 which provides comprehensive guidance on criminal forfeitures. The Committee received no comments on the proposed change.

Recommendation--The Committee recommends that the amendment to Rule 38 be approved as published and forwarded to the Judicial Conference.

9. ACTION ITEM--Rule 54. Application and Exception.

The proposed amendment to Rule 54 is a minor change reflecting the fact that the Canal Zone court no longer exists. The Committee received only two comments on the amendment; both supported the change.

Recommendation--The Committee recommends that the amendment to Rule 54 be approved as published and forwarded to the Judicial Conference.

B. Text of Proposed Amendments, Summary of Comments and GAP Reports.

Rule 6. The Grand Jury

* * * * *

(d) WHO MAY BE PRESENT

(1) While Grand Jury is in Session. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session~~,~~.

(2) During Deliberations and Voting. ~~but no~~ No person other than the jurors, and any interpreter necessary to assist a juror who is hearing or speech impaired, may be present while the grand jury is deliberating or voting.

* * * * *

(f) FINDING AND RETURN OF INDICTMENT. A grand jury may indict ~~An indictment may be found~~ only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury ,or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not vote to indict ~~concur in finding an indictment~~, the foreperson shall so report to a federal magistrate judge

in writing as soon as possible ~~forthwith~~.

COMMITTEE NOTE

Subdivision 6(d). As currently written, Rule 6(d) absolutely bars any person, other than the jurors themselves, from being present during the jury's deliberations and voting. Accordingly, interpreters are barred from attending the deliberations and voting by the grand jury, even though they may have been present during the taking of testimony. The amendment is intended to permit interpreters to assist persons who are speech or hearing impaired and are serving on a grand jury. Although the Committee believes that the need for secrecy of grand jury deliberations and voting is paramount, permitting interpreters to assist hearing and speech impaired jurors in the process seems a reasonable accommodation. *See also United States v. Dempsy*, 830 F.2d 1084 (10th Cir. 1987) (constitutionally rooted prohibition of non-jurors being present during deliberations was not violated by interpreter for deaf petit jury member).

The subdivision has also been restyled and reorganized.

Subdivision 6(f). The amendment to Rule 6(f) is intended to avoid the problems associated with bringing the entire jury to the court for the purpose of returning an indictment. Although the practice is long-standing, in *Breese v. United States*, 226 U.S. 1 (1912), the Court rejected the argument that the requirement was rooted in the Constitution and observed that if there were ever any strong reasons for the requirement, "they have disappeared, at least in part." 226 U.S. at 9. The Court added that grand jury's presence at the time the indictment was presented was a defect, if at all, in form only. *Id.* at 11. Given the problems of space, in some jurisdictions the grand jury sits in a building completely separated from the courtrooms. In those cases, moving the entire jury to the courtroom for the simple process of presenting the indictment may prove difficult and time consuming. Even where the jury is in the same location, having all of the jurors present can be unnecessarily cumbersome in light of the fact that filing of the indictment requires a certification as to how the jurors voted.

The amendment provides that the indictment must be presented either by the jurors themselves, as currently provided for in the rule, or by the foreperson or the deputy foreperson, acting on behalf of the jurors. In an appropriate case, the court might require all of the jurors to be present if it had inquiries about the indictment.

Summary of Comments on Rule 6.

Judge Hayden W. Head, Jr. (CR-001)
U.S. District Judge
Southern District of Texas
Corpus Christi, Texas
September 19, 1998

Judge Head believes that the proposed amendment which would allow for "interpreters" is overly broad and thus contravenes Title 28 U.S.C.A. §1865(b) which requires that all petit and grand jurors be required to speak English. Even if amendment is only for hearing impaired, he does not support it because he is against the introduction of another person into the inner sanctum of the grand jury proceedings. He further objects because he does not support the rule's proposed distinction between jurors and grand jurors.

John Gregg McMaster, Esq. (CR-002)
Attorney at Law
Tompkins and McMaster
Columbia, South Carolina
September 19, 1998

Mr. McMaster finds the proposed rule change "preposterous." He says that it would be a "travesty of justice" to allow someone "to be indicted by a person who does not understand or speak the language of the country or of the indictment." He reasons that is an immigrant's obligation to learn the language of his new country.

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes to Rule 6.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans states that the proposed changes seem sensible to him.

Judge George P. Kazen (CR-006)
Chief U.S. District Judge

Southern District of Texas
Laredo, Texas
October 7, 1998

Judge Kazen agrees with his colleague Judge Head about the proposed changes to Rule 6(d). He believes that this proposal is incomprehensible because jurors are required to speak and understand English in order to serve as jurors. He concedes that policy consideration support the narrow exception for deaf jurors.

Judge Cornelia G. Kennedy (CR-008)
Circuit Judge
United States Court of Appeals for the Sixth Circuit
Detroit, Michigan
October 21, 1997

Judge Kennedy believes the proposed change to Rule 6(f) which would allow the grand jury foreperson alone to return the indictment will save some time and avoid some inconvenience, but that it will also distance the grand jury from the court. She believes that having the whole grand jury present the indictment to the court allows members to express concerns and ask questions. She says that it is important for the grand jury to know that it is an "adjunct of the court... not merely votes required by the Assistant United States Attorney." Judge Kennedy also states that grand jury rooms should be in the court house. When they are not, she notes, it is even more important for the members of the grand jury to go before the court and be reminded of their function.

Judge Donald C. Ashmanskas (CR-010)
United States Magistrate Judge
United States District Court for the District of Oregon
Portland, Oregon
October 29, 1997

Magistrate Ashmanskas suggests specific amendments to Rule 6(f). He suggests that the name "presiding grand juror" be substituted for the proposed rule's moniker, "foreperson," and "deputy presiding grand juror" instead of "deputy foreperson." He also suggests that the indictments be permitted to be filed with district clerk, rather than before a magistrate or judge in open court. As an alternative, he suggests that the indictment be returned to a magistrate or district court judge. In a post script, he notes that he would favor a reduction in the size of the grand jury. He notes that in Oregon the grand jury is composed of seven people and five must concur for an indictment to be returned.

Magistrate Judge Richard P. Mesa (CR-018)
United States Magistrate Judge
Western District of Texas
El Paso, Texas
February 2, 1998

Judge Mesa wholeheartedly supports the proposed changes to Rule 6(f) because the practical result will be that grand jurors will be able to leave the court house at a reasonable hour.

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL believes that the proposal to Rule 6(a) which would allow interpreters into grand jury proceedings should not be adopted at this time because it would not be consistent with 28 U.S.C. §1865 (b) (2,3,4). The NACDL opposes the proposed amendment to Rule 6(f) which would allow the grand jury foreperson to return the indictment alone. They believe that having all of the grand jurors present when an indictment is returned reminds the grand jurors that they are an extension of the court and independent from the prosecutor and make the jurors take the process more seriously. The NACDL concludes by asserting that the "salutary purposes served by Rule 6(f) outweigh whatever minor inconveniences and administrative problems may be encountered in achieving them."

David Long, Dir. of Research (CR-023)
Criminal Law Section, State Bar of California
San Francisco, CA
March 18, 1998

The Criminal Law Executive Committee of the California State Bar supports the proposed amendments to Rule 6. It opines that if an interpreter will assist a grand juror, that person's presence should be permitted. And it believes that permitting the foreperson or deputy foreperson to return the indictment may avoid further impingement on the grand jurors time.

Federal Magistrate Judges Association (CR-024)

Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the amendments to Rule 6. It recommends that a statement be added to the Committee Note to remind interpreters of the need for confidentiality.

GAP Report--Rule 6.

The Committee modified Rule 6(d) to permit only interpreters assisting hearing or speech impaired grand jurors to be present during deliberations and voting.

Rule 7. The Indictment and the Information

(c) NATURE AND CONTENTS.

(2) *Criminal Forfeiture*. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information ~~shall allege the extent of the interest or property subject to forfeiture~~ alleges that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

* * * * *

COMMITTEE NOTE

The rule is amended to reflect new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 7.

The Committee received no written comments on the proposed amendment to Rule 7.

GAP Report--Rule 7

The Committee made no changes to the published draft of the Rule 7 amendment.

Rule 11. Pleas

(a) ALTERNATIVES.

(1) *In General.* A defendant may plead ~~not~~ guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant ~~corporation~~ organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty.

* * * * *

(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

* * * * *

(e) PLEA AGREEMENT PROCEDURE.

(1) *In General.* The attorney for the government and the

attorney for the defendant--or the defendant when acting pro se-- may agree ~~engage in discussions with a view toward reaching an agreement~~ that, upon the defendant's entering ~~of~~ a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will: ~~do any of the following:~~

(A) move to dismiss ~~for dismissal of~~ other charges; or

(B) recommend, ~~make a recommendation,~~ or agree not to oppose the defendant's request, ~~for~~ a particular sentence , ~~—~~ or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such ~~with the understanding that such~~ recommendation or request is ~~shall~~ not ~~be~~ binding on ~~upon~~ the court; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case ,or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any ~~such~~ discussions between the parties concerning any such plea agreement.

* * * * *

COMMITTEE NOTE

Subdivision (a). The amendment deletes use of the term "corporation" and substitutes in its place the term "organization," with a reference to the definition of that term in 18 U.S.C. § 18.

Subdivision (c)(6). Rule 11(c) has been amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the increasing number of direct appeals and collateral reviews challenging sentencing decisions. Given the increased use of such provisions, the Committee believed it was important to insure that first, a complete record exists regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant. Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers.

Subdivision (e). Amendments have been made to Rule 11(e)(1)(B) and (C) to reflect the impact of the Sentencing Guidelines on guilty pleas. Although Rule 11 is generally silent on the subject, it has become clear that the courts have struggled with the subject of guideline sentencing vis a vis plea agreements, entry and timing of guilty pleas, and the ability of the defendant to withdraw a plea of guilty. The amendments are intended to address two specific issues.

First, both subdivisions (e)(1)(B) and (e)(1)(C) have been amended to recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. Under an (e)(1)(B) agreement, the government, as before, simply agrees to make a recommendation to the court, or agrees not to oppose a defense request concerning a particular sentence or consideration of a sentencing guideline, factor, or policy statement. The amendment makes it clear that this type of agreement is not binding on the court. Second, under an (e)(1)(C) agreement, the government and defense have actually agreed on what amounts to an appropriate sentence or have agreed to one of the specified components. The amendment also makes it clear that this agreement is binding on the court once the court accepts it. As is the situation under the current Rule, the court retains absolute discretion whether to accept a plea agreement.

Summary of Comments on Rule 11.

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes.

Judge Paul D. Borman (CR-004)
United States District Judge
United States District Court for the Eastern District of Michigan
Detroit, Michigan
September 24, 1997

Judge Borman submitted a request to testify in testifying about proposed amendments to Rule 11. He does not express an opinion on the proposed amendments.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans summarily states that the proposed changes seem sensible to him.

Judge George P. Kazen (CR-006)
Chief U.S. District Judge
Southern District of Texas
Laredo, Texas
October 7, 1998

Judge Kazen states that the proposed changes to Rule 11 appear to be helpful. He notes that the Committee has still not addressed the problem of Rule 11(e)(4) and the problem of rejected plea agreements and the defendant's opportunity to withdraw a plea.

Judge Malcolm F. Marsh (CR-009)
United States District Judge
United States District Court for the District of Oregon
Portland, Oregon
October 21, 1997

Judge Marsh is opposed to the proposed amendment to Rule 11(e)(1)(C). He is concerned with allowing parties to agree to a specific

sentencing range. He fears that this practice will allow parties to agree to offense characteristics regardless of the actual facts of the as found in the Pre-Sentencing Report. He notes that the primary danger is allowing parties to bind the court to certain facts, thus taking away more of the court's discretionary authority and shifting it to the prosecutor's office.

Thomas W. Hillier, II (CR-012)
Chair, Legislative Subcommittee
Federal Public Defender
Western District of Washington
Seattle, Washington
December 5, 1997

Mr. Thomas Hillier, Chair, Legislative Subcommittee of the Federal Public Defender, opposes the proposed amendments Rule 11(c) concerning a defendant's waiver of rights to appeal. He first commends the general purpose of ensuring knowing, voluntary appeal waivers. But, he "strongly disfavors" the proposal. He notes in his initial remarks that if the Committee does go forward with the proposed amendments, the Federal Public Defenders urge cautionary language in the notes that emphasizes the problems associated with appeal waivers. Mr. Hillier cites *United States v. Melancon*, 972 F.2d 566, 569-580 (5th Cir. 1992) for its arguments against appeal waivers. He attaches an article which identifies other judges who believe that appeal waivers should not be used. Mr. Hillier believes that the proposed amendment is premature and states that the Committee should not go forward with any proposal on this issue until the courts have had an opportunity to review all of the problems that appeal waivers present. He notes that the Supreme Court will eventually decide the issue.

Judge Paul L. Friedman (CR-016)
United States District Judge
United States District Court for the District Court of Columbia
Washington, D.C.
January 5, 1998

Judge Friedman is opposed to the proposed changes to Rule 11. He opposes the amendment because in his view there can be no valid waiver of such appellate rights and that the proposed amendment would suggest that such waivers are lawful. He encloses his opinion in *United States v. Raynor*, Crim. No. 97-186 (D.D.C. Dec. 29, 1997) and a copy of Judge Greene's opinion in *United States v. Johnson,* Crim. No. 97-305 (D.D.C. August 8, 1997), to support his position.

Mr. Kenneth Laborde (CR-017)
Chief Probation Officer
Eastern District of Texas
Beaumont, Texas
January 26, 1998

Mr. Laborde is opposed to the proposed changes to Rule 11(e)(1)(C). His primary concern is that a defendant's sentence may be determined by prosecutors and defense counsel before the probation officer has an opportunity to conduct a pre-sentence investigation and apply the sentencing guidelines. He is also concerned that parties "may be tempted to circumvent the guidelines" in order to avoid trial. He emphasizes that the proposed changes to the Rule would deprive the court of probation officers' expertise in this area. Finally, he writes that the intended result of fewer appeals would occur, but that the quality of justice will suffer, and this is too great a cost.

Magistrate Judge Richard P. Mesa (CR-018)
United States Magistrate Judge
Western District of Texas
El Paso, Texas
February 2, 1998

Judge Mesa supports the changes to Rule 11(c) because he anticipates that "many problems and questionable petitions" will be avoided.

Richard A. Rossman (CR-019)
Chairperson, Standing Committee on United States Courts of the State Bar of Michigan
Detroit, Michigan
February 9, 1998

On behalf of the Standing Committee on United States Courts of the State Bar of Michigan, Mr. Rossman, the chair, indicates that his committee is "unanimous in its opposition to the proposed amendment to Rule 11(c)(6). First, the committee believes that waiver provisions have no place in plea agreements and secondly, there is no need to highlight any particular provision in the agreement. Finally, a colloquy itself might raise confusion or inadequate explanations regarding the provision. It has no objection to the other amendments proposed for Rule 11.

Mr. Robert Ritchie (CR-020)
Chairman, Federal Criminal Procedures Committee,
American College of Trial Lawyers

Knoxville, Tennessee\
February 11, 1998

Mr. Ritchie writes on behalf of the American College of Trial Lawyers and is opposed to the proposed changes of Rule 11(c)(6) because the changes would institutionalize the practice of requiring criminal defendants to waive rights of appeal and collateral attack of illegal sentences. He notes that "Rule 11(e)(1)(c) already allows agreed-to sentences, which is an appropriate procedure through which to ensure that a sentencing appeal is unnecessary." He states that the proposed practice violates the Due Process Clause because the waiver would not be knowing, voluntary and intelligent when a sentence has not yet been imposed. In support of his rationale he cites *United States v. Johnson*, written by District Court Judge Green (see, *supra*, Judge Friedman) and *United States v. Melancon*, 972 F.2d 566, 570-580 (5th Cir. 1992).

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL strongly oppose the proposed amendment to Rule 11(c)(6) on both procedural and substantive grounds. The NACDL recognizes the purpose of the amendment is to ensure that defendants who are waiving their appellate rights are doing so knowingly. But it believes that this proposed change would signal the Judicial Conference's approval of appeal waivers. The NACDL states that appeal waivers are "so inherently coercive and unfair that they should not be tolerated in our system of justice." The NACDL believes that the amendment is premature because it puts the Committee in the position of making law. This is true in large part, the NACDL notes, because the courts of this country have reached consensus on whether or not appeal waivers are constitutionally permissible. The NACDL also believes that the amendment is premature because the courts do not agree on what an appeal waiver means. The NACDL notes that even courts who accept this practice disagree on what may be waived. The NACDL expresses its support of the opinion of District Court Judge Friedman and Green in *United States v. Raynor*, Crim. No. 97-186 (D.D.C. Dec. 29, 1997) and *United States v. Johnson*, Crim. No. 97-305 (D.D.C. August 8, 1997). The NACDL states that appeal

waivers violate the constitution, violate public policy and invite, and encourage illegal sentences where both parties to an agreement no that their practices will not be subject to review.

Professor Bruce Comly French (CR-022)
Honorable Barbara Jones
Co-Chaipersons
ABA Criminal Justice Section
Committee on Rules of Evidence and Criminal Procedure
Washington, D.C.
February 17, 1998

The ABA supports the proposed change to rule 11(c)(6) that would make a defendant aware of the waiver of any appellate rights. The ABA urges the Committee to consider ABA Standard for Criminal Justice 14.1.4(c) that encourages the court to make the defendant aware of possible collateral consequences of pleading guilty. However, the ABA opposes the proposal to change the second sentence of Rule 11(e)(1)(C) because it mandates the court acceptance of a plea binds the court to specific sentencing ranges. The ABA generally supports the third sentence of (e)(1)(C) that would prohibit court participation in any discussions between the parties concerning plea agreements. However, it notes that ABA Standard 14-3.3 would permit the parties upon agreement to seek the judge's opinion about the acceptability of certain plea agreements.

David Long, Dir. of Research (CR-023)
Criminal Law Section, State Bar of California
San Francisco, CA
March 18, 1998

The Criminal Law Executive Committee of the California State Bar supports the amendments to Rule 11. Specifically, it believes that requiring judges to determine the defendant's understanding of a waiver provision will ensure that the defendant knows what rights he or she is waiving. The Committee also believes that the amendments to Rule 11(e) reflect the current practice of agreeing to guideline ranges or factors.

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the proposed amendments to Rule 11.

They view the amendments as neither significant nor controversial. Instead, they note, the proposed changes "represent incremental improvements of the rule that clarify its meaning, make it work more effectively with other statutes or regulations, and bring it into conformity with evolving practice."

Summary of Testimony--Rule 11

Judge Paul D. Borman
United States District Judge
United States District Court for the Eastern District of Michigan
Detroit, Michigan
Testified--April 27, 1998

Testifying before the Committee, Judge Borman expressed strong disagreement with the proposed amendment to Rule 11(c)(6). He believed that requiring the defendant to waive the right to appeal a sentence is not permitted and violates the very spirit of the Sentencing Guidelines. He was particularly concerned that the amendment would signal the Advisory Committee's approval of such waivers, which have not been ruled upon by the Supreme Court.

GAP Report--Rule 11.

The Committee made no changes to the published draft amendments to Rule 11. But it did add language to the Committee Note which reflects the view that the amendment is not intended to signal its approval of the underlying practice of including waiver provisions in pretrial agreements.

Rule 24. Trial Jurors

* * * * *

(c) ALTERNATE JURORS.

(1) *In General.* The court may empanel no ~~direct that not~~ more

than 6 jurors, in addition to the regular jury, ~~be called and impanelled~~ to sit as alternate jurors. An alternate juror, ~~Alternate jurors~~ in the order ~~in which they are~~ called, shall replace a juror ~~jurors~~ who, ~~prior to the time the jury retires to consider its verdict,~~ becomes or is found ~~become or are found~~ to be unable or disqualified to perform juror ~~their~~ duties. Alternate jurors shall (i) be drawn in the same manner, ~~shall~~ (ii) have the same qualifications, ~~shall~~ (iii) be subject to the same examination and challenges, and ~~shall~~ (iv) take the same oath as regular jurors. An alternate juror has ~~and shall have~~ the same functions, powers, facilities and privileges as a regular juror. ~~the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.~~

(2) *Peremptory Challenges.* In addition to challenges otherwise provided by law, each ~~Each~~ side is entitled to 1 additional peremptory challenge ~~in addition to those otherwise allowed by law~~ if 1 or 2 alternate jurors are empaneled ~~to be impanelled~~, 2 additional peremptory challenges if 3 or 4 alternate jurors are ~~to be~~ empaneled ~~impanelled~~, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled ~~to be impanelled~~. The additional peremptory challenges may be used to remove ~~against~~ an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove ~~against~~ an alternate juror.

(3) *Discharge*. When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a regular juror during deliberations.

COMMITTEE NOTE

As currently written, Rule 24(c) explicitly requires the court to discharge all of the alternate jurors--who have not been selected to replace other jurors--when the jury retires to deliberate. That requirement is grounded on the concern that after the case has been submitted to the jury, its deliberations must be private and inviolate. *United States v. Houlihan*, 92 F.3d 1271, 1285 (1st Cir. 1996), *citing United States v. Virginia Election Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

Rule 23(b) provides that in some circumstances a verdict may be returned by eleven jurors. In addition, there may be cases where it is better to retain the alternates when the jury retires, insulate them from the deliberation process, and have them available should one or more vacancies occur in the jury. That might be especially appropriate in a long, costly, and complicated case. To that end the Committee believed that the court should have the discretion to decide whether to retain or discharge the alternates at the time the jury retires to deliberate and to use Rule 23(b) to proceed with eleven jurors or to substitute a juror or jurors with alternate jurors who have not been discharged.

In order to protect the sanctity of the deliberative process, the rule requires the court to take appropriate steps to insulate the alternate jurors. That may be done, for example, by separating the alternates from the deliberating jurors and instructing the alternate jurors not to discuss the case with any other person until they replace a regular juror. *See, e.g.*, *United States v. Olano*, 507 U.S. 725 (1993) (not plain error to permit alternate jurors to sit in during deliberations); *United States v. Houlihan*, 92 F.3d 1271, 1286-88 (1st Cir. 1996) (harmless error to retain alternate jurors in violation of Rule 24(c); in finding harmless error the court cited the steps taken by the trial judge to insulate the alternates). If alternates are

used, the jurors must be instructed that they must begin their deliberations anew.

Finally, subsection (c) has been reorganized and restyled.

Summary of Comments on Rule 24(c).

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans states that the proposed changes seem sensible to him.

Prentice H. Marshall (CR-011)
Ponce Inlet, Florida
November 14, 1997

Mr. Marshall is very much in favor of the proposed amendment to Rule 24(c) which would allow district judges to retain alternate jurors during deliberations so that they may be substituted for juror who becomes incapacitated during deliberations. He is not opposed to any of the proposed changes.

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL urges that the proposed amendment not be adopted because at the present time there is no provision which would allow an alternate juror to replace a regular juror after deliberations have commenced. It notes that if the Committee's intent is to enable alternates to replace jurors during deliberations, the Committee should propose an

amendment which says so forthrightly.

Professor Bruce Comly French (CR-022)
Honorable Barbara Jones
Co-Chaipersons
ABA Criminal Justice Section
Committee on Rules of Evidence and Criminal Procedure
Washington, D.C.

The ABA opposes the proposed change to Rule 24(c) that allows for the retention of alternate jurors once jury deliberations begin. Quoting ABA Standard for Criminal Justice 15-2.9 it notes that allowing this practice increases risks of the jury returning a verdict based on "a less than thorough evaluation of the evidence."

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the proposed amendments to Rule 24. It agrees that providing the trial court with the option of retaining the alternate jurors may be an appropriate alternative, especially in long and complicated cases.

GAP Report--Rule 24(c).

Rule 31. Verdict

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~~(e) CRIMINAL FORFEITURE. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.~~

COMMITTEE NOTE

The rule is amended to reflect the creation of new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 31

The Committee received no written comments on the proposed change to Rule 31.

GAP Report--Rule 31

The Committee made no changes to the published draft amendment to Rule 31.

Rule 32. Sentence and Judgment

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(d) JUDGMENT.

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(2) *Criminal Forfeiture*. Forfeiture procedures are governed by Rule 32.2. ~~If a verdict contains a finding that property is subject to criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings~~

~~and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.~~

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COMMITTEE NOTE

The rule is amended to reflect the creation of new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 32.

The Committee received no comments on the proposed conforming amendment to Rule 32(d).

GAP Report--Rule 32.

The Committee made no changes to the published draft.

32.2. Criminal Forfeiture

(a) *INDICTMENT OR INFORMATION.* No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information alleges that a defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

(b) *HEARING AND ORDER OF FORFEITURE.*

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the

indictment or information for which criminal forfeiture is alleged, the court shall determine what property is subject to forfeiture because it is related to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post trial hearing. If the property is subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim.

(2) If no third party petition as provided in (b)(1) is timely filed, the court shall determine whether the property should be forfeited in whole or in part depending on the extent of the defendant's interest in the property. The determination may be made at any time before the order of forfeiture becomes final under subdivision (c), and may be based on evidence already in the record, including a written plea agreement, or evidence submitted by the government in a motion for entry of a final order of forfeiture. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole, or in part, to a

co-defendant or a third party. If the court determines that the defendant, or any combination of co-defendants, were the only persons with a legal interest (or in the case of illegally obtained property, a possessory interest) in the property, the court shall enter a final order forfeiting the property in its entirety. If the court determines that the defendant or combination of co-defendants, had a legal interest (or in the case of illegally obtained property, a possessory interest) in only a portion of the property, the court shall enter a final order forfeiting the property to the extent of the defendant's or defendants' interest.

(3) When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture; conduct any discovery as the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

(c) *ANCILLARY PROCEEDING.*

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding.

(i) The court may consider a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(ii) If a Rule 32.2(c)(1) motion to dismiss is denied, or not made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve factual issues before conducting an evidentiary hearing. After discovery ends, either party may ask the court to dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

(2) After the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary

to account for the disposition of any third-party petition.

(3) If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions is not appealable until all petitions are resolved, unless the court determines that there is no just reason for delay and directs the entry of final judgment on one or more but fewer than all of the petitions.

(4) The ancillary proceeding is not considered a part of sentencing.

(d) *STAY OF FORFEITURE PENDING APPEAL.* If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court determines that the order of forfeiture shall be amended to recognize a third party's interest in the property, the court shall amend the order of forfeiture but shall refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.

(e) *SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.*

(1) The court, on motion by the government, may at any time enter an order of forfeiture—or amend an existing order of forfeiture—to include property which:

(i) is subject to forfeiture under an existing order of forfeiture and was located and identified after that order of forfeiture was entered; or

(ii) is substitute property which qualifies for forfeiture under an applicable statute.

(2) If the government makes the requisite showing that the property is subject to forfeiture under either (e)(1)(i) or (e)(1)(ii), the court shall:

(i) enter an order forfeiting the property, or amend an existing preliminary or final order to include that property;

(ii) if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (c) as to the property; and

(iii) if no third party files a petition, enter an order forfeiting the property under subdivision (b)(2).

COMMITTEE NOTE

Rule 32.2 consolidates a number of procedural rules governing the forfeiture of assets in a criminal case. Existing Rules 7(c)(2), 31(e) and 32(d)(2) are also amended to conform to the new rule. In addition, the forfeiture-related provisions of Rule 38(e) are stricken.

Subsection (a). Subsection (a) is derived from Rule 7(c)(2) which provides that notwithstanding statutory authority for the forfeiture of property following a criminal conviction, no forfeiture order may be entered unless the defendant was given notice of the forfeiture in the indictment or information. As courts have held, subsection (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself; instead, such an itemization may be set forth in one or more bills of particulars. *See United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996), *aff'g* 846 F. Supp. 463 (E.D. Va. 1994) (*Moffitt* I) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars). *See United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subsection (b) Subsection (b) replaces Rule 31(e) which provides that the jury in a criminal case must return a special verdict "as to the extent of the interest or property subject to forfeiture." *See United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995) (Rule 31(e) only applies to jury trials; no special verdict required when defendant waives jury right on forfeiture issues). After the Rule was promulgated in 1972, changes in the law created several problems.

The first problem concerns the role of the jury. When Rule 31(e) was promulgated, it was assumed that criminal forfeiture was akin to a separate criminal offense on which evidence would be presented and the jury would have to return a verdict. In *Libretti v. United States*, 116 S. Ct. 356 (1995), however, the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case and that the defendant has no constitutional right to have the jury determine any part of the forfeiture. The special verdict requirement in Rule 31(e), the Court said, is in the nature of a statutory right that can be modified or repealed at any time.

Even before *Libretti*, lower courts had determined that criminal forfeiture is a sentencing matter and concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the government must establish the forfeitability of the property by a preponderance of the evidence. *See United States v. Myers*, 21 F.3d 826

(8th Cir. 1994) (preponderance standard applies because criminal forfeiture is part of the sentence in money laundering cases); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Myers*); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same).

Traditionally, juries do not have a role in sentencing other than in capital cases, and elimination of that role in criminal forfeiture cases would streamline criminal trials. Undoubtedly, it may be confusing for a jury to be instructed regarding a different standard of proof in the second phase of the trial, and it is burdensome to have to return to hear additional evidence after what may have been a contentious and exhausting period of deliberation regarding the defendant's guilt or innocence.

For these reasons, the proposal replaces Rule 31(e) with a provision that requires the court alone, as soon as practicable after the verdict in the criminal case, to hold a hearing to determine if the property was subject to forfeiture, and to enter a preliminary order of forfeiture.

The second problem with Rule 31(e) concerns the scope of the determination that must be made prior to entering an order of forfeiture. This issue is the same whether the determination is made by the court or by the jury.

As mentioned, the current Rule requires the jury to return a special verdict "as to the extent of the interest or property subject to forfeiture." Some courts interpret this to mean only that the jury must answer "yes" or "no" when asked if the property named in the indictment is subject to forfeiture under the terms of the forfeiture statute--*e.g.* was the property used to facilitate a drug offense? Other courts also ask the jury if the defendant has a legal interest in the forfeited property. Still other courts, including the Fourth Circuit, require the jury to determine the *extent* of the defendant's interest in the property vis a vis third parties. *See United States v. Ham*, 58 F.3d 78 (4th Cir. 1995) (case remanded to the district court to empanel a jury to determine, in the first instance, the extent of the defendant's forfeitable interest in the subject property).

The notion that the "extent" of the defendant's interest must be established as part of the criminal trial is related to the fact that criminal forfeiture is an *in personam* action in which only the defendant's interest in the property may be forfeited. *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996). When the criminal forfeiture statutes were first enacted in the 1970's, it was clear that a forfeiture of property other than the defendant's could not occur in a criminal case, but there was no mechanism designed to limit the forfeiture to the defendant's interest. Accordingly, Rule 31(e) was drafted to make a determination of the "extent" of the defendant's interest part of the verdict.

The problem, of course, is that third parties who might have an interest in the forfeited property are not parties to the criminal case. At the

same time, a defendant who has no interest in property has no incentive, at trial, to dispute the government's forfeiture allegations. Thus, it was apparent by the 1980's that Rule 31(e) was an inadequate safeguard against the inadvertent forfeiture of property in which the defendant held no interest.

In 1984, Congress addressed this problem when it enacted a statutory scheme whereby third party interests in criminally forfeited property are litigated by the court in an ancillary proceeding following the conclusion of the criminal case and the entry of a preliminary order of forfeiture. *See* 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l). Under this scheme, the court orders the forfeiture of the defendant's interest in the property--whatever that interest may be--in the criminal case. At that point, the court conducts a separate proceeding in which all potential third party claimants are given an opportunity to challenge the forfeiture by asserting a superior interest in the property. This proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the property such that the forfeiture of the property from the defendant would be invalid.

The notice provisions regarding the ancillary proceeding are equivalent to the notice provisions that govern civil forfeitures. *Compare* 21 U.S.C. § 853(n)(1) *with* 19 U.S.C. § 1607(a); *see United States v. Bouler*, 927 F. Supp. 911 (W.D.N.C. 1996) (civil notice rules apply to ancillary criminal proceedings). Notice is published and sent to third parties who have a potential interest. *See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Indosuez Bank)*, 916 F. Supp. 1276 (D.D.C. 1996) (discussing steps taken by government to provide notice of criminal forfeiture to third parties). If no one files a claim, or if all claims are denied following a hearing, the forfeiture becomes final and the United States is deemed to have clear title to the property. 21 U.S.C. § 853(n)(7); *United States v. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under § 853(n)(7) and can market the property notwithstanding third party's name on the deed).

Thus, the ancillary proceeding has become the forum for determining the extent of the defendant's forfeitable interest in the property. It allows the court to conduct a proceeding in which all third party claimants can participate and which ensures that the property forfeited actually belongs to the defendant.

Since the enactment of the ancillary proceeding statutes, the requirement in Rule 31(e) that the court (or jury) determine the extent of the defendant's interest in the property as part of the criminal trial has become an unnecessary anachronism that leads more often than not to duplication and a waste of judicial resources. There is no longer any reason to delay the conclusion of the criminal trial with a lengthy hearing over the extent of the defendant's interest in property when the same issues

will have to be litigated a second time in the ancillary proceeding if someone files a claim challenging the forfeiture. For example, in *United States v. Messino*, 921 F. Supp. 1231 (N.D. Ill. 1996), the court allowed the defendant to call witnesses to attempt to establish that they, not he, were the true owners of the property. After the jury rejected this evidence and the property was forfeited, the court conducted an ancillary proceeding in which the same witnesses litigated their claims to the same property.

A more sensible procedure would be for the court, once it determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding.

This approach would also address confusion that occurs in multi-defendant cases where it is clear that each defendant should forfeit whatever interest he may have in the property used to commit the offense, but it is not at all clear which defendant is the actual owner of the property. For example, suppose A and B are co-defendants in a drug and money laundering case in which the government seeks to forfeit property involved in the scheme that is held in B's name but of which A may be the true owner. It makes no sense to invest the court's time in determining which of the two defendants holds the interest that should be forfeited. Both defendants should forfeit whatever interest they may have. Moreover, to the extent that the current rule forces the court to find that A is the true owner of the property, it gives B the right to file a claim in the ancillary proceeding where he may attempt to recover the property despite his criminal conviction. *United States v. Real Property in Waterboro*, 64 F.3d 752 (lst Cir. 1995) (co-defendant in drug/money laundering case who is not alleged to be the owner of the property is considered a third party for the purpose of challenging the forfeiture of the other co-defendant's interest).

The new Rule resolves these difficulties by postponing the determination of the extent of the defendant's interest until the ancillary proceeding. As provided in (b)(1), the court, as soon as practicable after the verdict in the criminal case, would determine if the property was subject to forfeiture in accordance with the applicable statute, e.g., whether the property represented the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. The determination could be made by the court alone based on the evidence in the record from the criminal trial or the facts set forth in a written plea agreement submitted to the court at the time of the defendant's guilty plea, or the court could hold a hearing to determine if the requisite relationship existed between the property and the offense. It would not be necessary to determine at this stage what interest any defendant might have in the property. Instead, the court would order the forfeiture of whatever interest each defendant might have in the property and conduct the ancillary proceeding.

If someone files a claim, the court would determine the respective interests of the defendants versus the third party claimants and amend the order of forfeiture accordingly. On the other hand, as recognized in (b)(2), if no one files a claim in the ancillary proceeding, the court would make a finding as to the extent of the defendant's interest in the property. If the court finds that the defendant (or any combination of defendants) were the only persons with an interest in the property, then it would enter an order forfeiting the property in its entirety. Otherwise, the final order may forfeit only the defendant's interest in the property. This corresponds to the requirement under current law, at least as it is interpreted in some courts, in instances where Rule 31(e) applies.

The court may make the determination of the defendant's interest based on evidence in the record, or on additional evidence submitted by the government in support of the motion for the entry of a final judgment of forfeiture. The defendant would have no standing to object to the forfeiture on the ground that the property belonged to someone who could have filed a petition in the ancillary proceeding but failed to do so.

Subsection (b)(3) replaces Rule 32(d)(2) (effective December 1996). It provides that once the court enters a preliminary order of forfeiture directing the forfeiture of whatever interest each defendant may have in the forfeited property, the government may seize the property and commence an ancillary proceeding to determine the interests of any third party. Again, if no third party files a claim, the court, at the time of sentencing, will enter a final order forfeiting the property to the extent of the defendant's interest. If a third party files a claim, the order of forfeiture will become final as to the defendant at the time of sentencing but will be subject to amendment in favor of a third party pending the conclusion of the ancillary proceeding.

Because it is not uncommon for sentencing to be postponed for an extended period to allow a defendant to cooperate with the government in an ongoing investigation, the Rule would allow the order of forfeiture to become final as to the defendant before sentencing, if the defendant agrees to that procedure. Otherwise, the government would be unable to dispose of the property until the sentencing took place.

Subsection (c). Subsection (c) sets forth a set of rules governing the conduct of the ancillary proceeding. When the ancillary hearing provisions were added to 18 U.S.C. § 1963 and 21 U.S.C. § 853 in 1984, Congress apparently assumed that the proceedings under the new provisions would involve simple questions of ownership that could, in the ordinary case, be resolved in 30 days. *See* 18 U.S.C. § 1963(l)(4). Presumably for that reason, the statute contains no procedures governing motions practice or discovery such as would be available in an ordinary civil case.

Experience has shown, however, that ancillary hearings can involve

issues of enormous complexity that require years to resolve. *See United States v. BCCI Holdings (Luxembourg) S.A.*, 833 F. Supp. 9 (D.D.C. 1993) (ancillary proceeding involving over 100 claimants and $451 million); *United States v. Porcelli*, CR85-00756 (CPS), 1992 U.S. Dist. LEXIS 17928 (E.D.N.Y Nov. 5, 1992) (litigation over third party claim continuing 6 years after RICO conviction). In such cases, procedures akin to those available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the claims.

Because an ancillary hearing is part of a criminal case, it would not be appropriate to make the Civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the Civil Rules may be followed. These include the filing of a motion to dismiss a claim, conducting discovery, disposing of a claim on a motion for summary judgment, and appealing a final disposition of a claim. Where applicable, the amendment follows the prevailing case law on the issue. *See, e.g., United States v. Lavin*, 942 F.2d 177 (3rd Cir. 1991) (ancillary proceeding treated as civil case for purposes of applying Rules of Appellate Procedure); *United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors)*, 919 F. Supp. 31 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); *United States v. BCCI (Holdings) Luxembourg S.A. (In re Petition of Department of Private Affairs)*, 1993 WL 760232 (D.D.C. 1993) (applying court's inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules). The provision governing appeals in cases where there are multiple claims is derived from Fed. R. Civ. P. 54(b).

As noted in (c)(5), the ancillary proceeding is not considered a part of sentencing. Thus, the Federal Rules of Evidence would apply to the ancillary proceeding, as is the case currently.

Subsection (d). Subsection (d) replaces the forfeiture provisions of Rule 38(e) which provide that the court may stay an order of forfeiture pending appeal. The purpose of the provision is to ensure that the property remains intact and unencumbered so that it may be returned to the defendant in the event the appeal is successful. Subsection (d) makes clear, however, that a district court is not divested of jurisdiction over an ancillary proceeding even if the defendant appeals his or her conviction. This allows the court to proceed with the resolution of third party claims even as the appeal is considered by the appellate court. Otherwise, third parties would have to await the conclusion of the appellate process even to *begin* to have their claims heard. *See United States v. Messino*, 907 F. Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending).

Finally, subsection (d) provides a rule to govern what happens if the court determines that a third-party claim should be granted but the

defendant's appeal is still pending. The defendant, of course, is barred from filing a claim in the ancillary proceeding. *See* 18 U.S.C. § 1963(l)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the ancillary proceeding, that a third party has an interest in the property superior to that of the defendant cannot be binding on the defendant. So, in the event that the court finds in favor of the third party, that determination is final only with respect to the government's alleged interest. If the defendant prevails on appeal, he or she recovers the property as if no conviction or forfeiture ever took place. But if the order of forfeiture is affirmed, the amendment to the order of forfeiture in favor of the third party becomes effective.

Subsection (e). Subsection (e) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture at any time to include subsequently located property which was originally included in the forfeiture order and any substitute property. *See United States v. Hurley*, 63 F.3d 1 (lst Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Hurley*). Third parties, of course, may contest the forfeiture of substitute assets in the ancillary proceeding. *See United States v.Lester*, 85 F.3d 1409 (9th Cir. 1996).

Summary of Comments to Rule 32.2

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors all of the proposed changes.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans supports the proposed amendment.

Ms. Leslie Hagin (CR-013)
National Association of Criminal Defense Lawyers
Legislative Director and Counsel
December 12, 1997

Ms. Hagin states that his organization is submitting several significant proposed rule changes being considered by the committee. She requests permission to testify about the proposed changes to Rule 32.2.

Mr. Ronald F. Waterman (CR-014)
Gough, Shanahan, Johnons, & Waterman

Helena, Montana
December 16, 1997

Mr. Waterman writes that lenders and third parties have concerns about the procedures followed in forfeiture of a criminal defendant's interest in property, whether justified or not. He says that there exists a concern that a third party can lose legal interest in property without a meaningful opportunity to appear and defend title to the property. He adds that the adoption on Rule 32.2 is good because it resolves concerns raided by lenders and others immersing people in ancillary proceedings unless there is a finding that a criminal defendant has an interest in the property.

Peter Goldberger (CR-021b)
Ardmore, Pennsylvania
Co-Chair, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL is adamantly opposed to the continuing efforts to abolish the right to jury trial on government claims for criminal forfeiture, and to undermine procedural rights associated with such claims. The NACDL states that the proposed amendment is "undemocratic, disrespectful of our legal culture and history, and flawed in numerous particulars." The NACDL contends that the proposal appears to breach the Rules Enabling Act wall between procedural reform and substantive rights. It recommends that the Advisory Committee reject the proposed rule changes almost completely. The NACDL states that there is no good reason to abolish the historically-grounded right to a jury trial in criminal forfeiture allegations and that such practice is unconstitutional, despite the Supreme Court's decision in *Libretti v. United States*, 516 U.S. 29 (1995). The NACDL notes that the right to jury trial in criminal forfeiture cases was not the formal question presented to the court in that case and it maintains that eliminating juries will not streamline the process. It also suggests that juries will not be confused by varying standards of proof if the standard "beyond a reasonable doubt" is carried over into forfeiture proceedings. The organization contends that the jury's collective conscience should be preserved, allowing it to protect the citizens from overreaching prosecutors. It states that it believes the proposed reform has nothing to do with procedural reform, but everything to do with the desire to punish and the desire to win.

The NACDL also maintains that the proposed amendment to Rule 32.2(b) would eliminate the requirement of 31(e) requiring a fact-finder to determine the extent of the interest or property subject to forfeiture. The

NACDL states that the proposed changes to 32.2(a) would "further devastate the fairness of the criminal forfeiture process by destroying" the grand jury's and trial jury's respective functions. The NACDL urges the Committee to clarify, despite contrary judicial decisions, that "only property or interests in property specifically named in the indictment may be forfeited criminally." The NACDL writes that Proposed Rule 32.2(f) should safeguard the defendant's and interested third parties' rights to be heard on the issue.

The NACDL states that the creation of rules to ensure fairness in ancillary forfeiture proceedings is an excellent idea. It notes that the rights of "third parties" should not be less than the rights of anyone making a claim in a civil forfeiture proceeding. The NACDL attached a copy of Petitioner's Brief in *Libretti v. United States*.

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the adoption of new Rule 32.2. It notes that adoption of Rule 32.2 would effectively repeal the "statutory" right in Rule 31(e) to a jury trial for forfeitures but that the rule is a sensible and cost-effective procedure to resolve criminal forfeiture procedures.

Summary of Testimony--Rule 32.2

Mr. Bo Edwards
Mr. David Smith
National Association of Criminal Defense Lawyers

The witnesses expressed strong opposition to the proposed new Rule. Their chief objection centered on the fact that the new rule removes the right of jury to decide whether the defendant should forfeit any property. That right, they said, was not abrogated by the Supreme Court's decision in *Libretti*; the issue of whether a jury trial was not available in a forfeiture proceeding was not even briefed by the parties in that case. Even assuming that the right to jury is not constitutionally required, they urged the Committee to nonetheless retain that right under the Rules of Procedure. Doing so, they argued, would recognize the value that Americans place on property rights. They also objected to the summary procedures for making forfeiture proceedings and the possibility that the

property rights of innocent third parties would not be adequately protected.

Mr. Steff Casella
Department of Justice

Mr. Casella responded to the testimony of the witnesses representing the NADCL and pointed out that the Supreme Court in Libretti did clearly say that forfeiture proceedings are a part of sentencing. Based upon that view, the Department of Justice believed that the rule was consistent with existing practice and the constitution. He noted that the rights of third parties would be as protected as they currently are under statutory schemes for determining their interests in "ancillary proceedings."

GAP Report--Rule 32.2

The Committee amended the rule to clarify several key points. First, subdivision (b) was redrafted to make it clear that if no third party files a petition to assert property rights, the trial court must determine whether the defendant has an interest in the property to be forfeited and the extent of that interest. As published, the rule would have permitted the trial judge to order the defendant to forfeit the property in its entirety if no third party filed a claim.

Second, Rule 32.2(c)(4) was added to make it clear that the ancilllary proceeding is not a part of sentencing.

Third, the Committee clarified the procedures to be used if the government (1) discovers property subject to forfeiture after the court has entered an order of forfeiture and (2) seeks the forfeiture of "substitute" property under a statute authorizing such substitution.

Rule 38. Stay of Execution

* * * * *

(e) ~~CRIMINAL FORFEITURE,~~ NOTICE TO VICTIMS, AND RESTITUTION. A sanction imposed as part of the sentence pursuant to 18 U.S.C. ~~3554,~~ 3555, or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

COMMITTEE NOTE

The rule is amended to reflect the creation of new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 38.

The Committee received no comments on the proposed change to Rule 38.

GAP Report--Rule 38

The Committee made no changes to the published draft.

Rule 54. Application and Exception

(a) COURTS. These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the

covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; ~~and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone;~~ in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.

COMMITTEE NOTE

The amendment to Rule 54(a) is a technical amendment removing the reference to the court in the Canal Zone, which no longer exists.

Summary of Comments on Rule 54

David Long, Dir. of Research (CR-023)
Criminal Law Section, State Bar of California
San Francisco, CA
March 18, 1998

The Criminal Law Executive Committee of the California State Bar supports the proposed amendments to Rule 54.

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Federal Magistrate Judges supports the technical changes to the amendment to Rule 54.

GAP Report--Rule 54.

The Committee made no changes to the published draft.

III. Information Items--Rules Pending Further Discussion and Publication

At its April 1998 meeting the Committee discussed a number of proposed amendments to other Rules of Criminal Procedure. Although several of them are ready for publication and comment, the Committee has decided to defer any further action on those rules. None of the proposed amendments are critical at this point, and as noted, *infra*, the Committee will shortly embark on a restyling project of all of the rules. The Committee believed that the amendments should thus be deferred until the restyled rules are published.

A. Rule 5. Initial Appearance Before the Magistrate Judge. (Authority of Magistrate Judge to Grant Continuance Over Defendant's Objection)

At its April 1997 meeting, the Committee considered a proposed amendment to Rule 5(c) which would permit magistrate judges to grant continuances where the defendant objects. The original proposal originated in the Federal Magistrate Judges Association who pointed out that under the current version of Rule 5(c), during an initial appearance before a magistrate judge, that judge is not authorized to grant a continuance over an objection by the defendant; that authority rests only in a federal district judge. The rule mirrors 18 U.S.C. § 3060(c). The Committee decided to recommend to the Standing Committee that it first propose legislative changes to § 3060(c). The Committee, however, believed it more appropriate to for the Advisory Committee to propose a change to Rule 5(c) through the Rules Enabling Act and remanded the issue to the Advisory Committee. At its October 1997 meeting, the Committee considered the issue and decided not to pursue the issue any further, and reported that position to the Standing Committee at its January 1998 meeting.

The matter was presented to the Judicial Conference during its Spring 1998 meeting. In its summary of actions, the Conference remanded the issue to the Advisory Committee with:

> "instructions to the Rules Committee to propose an amendment to Criminal Rule 5(c) consistent with the amendment 18 U.S.C. § 3060 which has been proposed by the Magistrate Judges Committee."

At its April 1998 meeting the Advisory Committee did reconsider the proposed amendment and voted unanimously to approve the amendment but not to seek publication of the amendment at this time. The Committee is schedule to begin a restyling of the rules later this year and believes that rather than piecemeal amendments at this point, it would be better to defer any publication. A copy of the proposed amendment and Committee

Note are attached at Exhibit B.

B. Rules 10 (Arraignment) and 43 (Presence of Defendant) (Ability of Defendant to Waive Appearance at Arraignment).

The Committee is actively considering amendments to Rules 10 and 43 which would permit a defendant to waive an appearance at his or her arraignment. The rule would require that the waiver be in writing and with the consent of the court. In conjunction with those amendments, the Committee will also consider the possibility of amending Rules 10 and 43 to permit a defendant to waive an appearance for entering a plea on superseding indictment.

C. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition. (Court-Ordered Examination)

At its October 1998 meeting, the Committee will continue it consideration of amendments to Rule 12.2 which would accomplish two results. First, a defendant who intends to introduce expert testimony on the issue of mental condition at a capital sentencing proceeding would be required to give notice of an intent to do so. And second, the rule would make it clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice. The Committee is considering what provision should be made for releasing the results of that examination to the parties and the possible implications on the defendant's right against self-incrimination.

D. Rule 24(b). Peremptory Challenges. (Equalizing Number of Challenges for Defense and Prosecution)

The Committee has approved, by a vote of 6 to 5) an amendment to Rule 24(b) which equalizes the number of peremptory challenges in a non-capital felony case at 10 per side. The language would track the most recent legislative proposal in § 501, Senate Bill 3 (*Omnibus Crime Control Act of 1997*). The momentum for the amendment was generated in part by the fact that some members of Congress continue to show an interest in amending Rule 24(b).

In 1990, the Advisory Committee proposed an amendment to Rule 24(b) which would have equalized the number of peremptory challenges—six apiece—for the prosecution and the defense by reducing the number of challenges available to the defense by four. The proposed amendment was approved by the Standing Committee for public comment but when it reviewed the proposal again in February 1991 following that

comment period, it rejected the amendment. Since then, there has been no attempt to revisit the issue by either the Advisory Committee or Standing Committee. The Standing Committee's rejection of the proposal in 1991 has generally been used by the Administrate Office and Judicial Conference to convince Congress not to amend Rule 24(b).

Nonetheless, the Committee believed that it light of persistent proposals to legislatively amend Rule 24(b) it would be appropriate to revisit the issue and be prepared, if necessary, to seek public comment on the proposed equalization.

The amendment is not considered essential and could wait for publication of the restyled Rules of Criminal Procedure.

E. Rule 26. Taking of Testimony (Electronic Transmission)

The Committee has considered an amendment to Rule 26 which would conform that rule to Civil Rule 43 regarding the taking of testimony in court through means other than oral testimony. After discussing the rule, however, the Committee decided to defer further consideration of that amendment until it has had an opportunity to discuss further possible Confrontation Clause concerns and whether such testimony should be preferred over deposition testimony.

F. Rule 30. Submission of Requests for Instructions.

An amendment to Rule 30, which would permit the court to require the parties to submit pretrial requests for instructions was published for public comment last fall. At its April 1998 meeting, the Committee discussed the comments received and decided to defer any further consideration of amendments to the Rule. The Civil Rules Committee is considering similar amendments to Rule 51 and is also considering possible amendments which would clarify issues of preservation of error re instructions errors. The Committee will continue discussions of this item.

G. Rule 32. Sentence and Judgment (Release of Presentence Reports).

The Committee on Criminal Law is currently considering several options for dealing with disclosure of presentence reports to someone other than the parties. One of the options under consideration by that Committee is the adoption of a model local rule on the topic. The issue apparently arose from a question posed to the General Counsel's office. At its April 1998 meeting, the Advisory Committee discussed this issue and recommended that the Chair appoint a subcommittee to consider any proposed amendments at its next meeting. The Chair also indicated that he would contact the Chair

of the Criminal Law Committee to coordinate any proposed amendments.

H. Rule 49. Service and Filing of Papers.

The Committee has briefly discussed a proposal to amend Rule 49 to permit the clerk of the court to forward notices by fax or other electronic means. Similar amendments are proposed for Appellate Rule 3(d) and Civil Rule 77(d). Although the Committee has proposed no specific language and has taken no position on the proposal, the Chair will continue to coordinate the proposal with the Subcommittee on Technology.

I. Rules Governing § 2254 and § 2255 Rules (Habeas Corpus Proceedings)

A subcommittee of the Advisory Committee is actively considering a number of amendments to the rules governing habeas corpus proceedings which will make the two sets of rules consistent with each other and make any other conforming amendments resulting from the Antiterrorism and Effective Death Penalty Act of 1996.

IV. Information Items--Rules Possibly Affected by Legislative Proposals.

A. Rule 46. Release From Custody (Authority to Revoke Bond for Reasons Other than Nonappearance).

Last summer, Representative Bill McCullum (Fla.) introduced H.R. 2134, "Bail Bond Fairness Act," which would amend Rule 46(e) to limit the authority to revoke bonds to those situations where a defendant has failed to appear. Under current practice a magistrate or judge may impose conditions which are not limited to failures to appear, e.g., to remain in particular location or to refrain from violating the law, etc. Representative McCullum agreed to delay any further action on his proposal until the Advisory Committee had an opportunity to review the matter under the Rules Enabling Act and decide whether to propose and forward to the Standing Committee an amendment of its own.

At the April 1998 meeting the Committee fully discussed the issue and determined that no amendment should be recommended to the Rule. A poll of magistrate judges indicated that many do not use corporate sureties but instead release a defendant on personal recognizance or when a friend or family member posts personal property or signs an unsecured bond. Some do revoke bond for reasons other than nonappearance. The Committee learned that in those districts the magistrates believe strongly that holding a relative's or friend's assets insure compliance with release conditions. The Committee

ultimately voted by a narrow margin to reject any proposed amendments which would limit the current practice. A letter explaining the Committee's action has been sent to Representative McCullom.

B. Rules Governing Attorney Conduct.

Following a presentation by Professor Coquillette on proposed rules governing attorney conduct in federal courts and the options available for addressing that issue, the Committee voted unanimously to authorize the Chair to appoint two members to serve on a coordinating committee to address the issue and make recommendations. The Committee took no position on whether to adopt a "dynamic conformity rule," a core set of rules, or a complete set of rules governing attorney conduct.

C. Status Report on Proposed Restyling of Criminal Rules.

Judge Parker, Chair of the Style Subcommittee, has informed the Criminal Rules Committee that the subcommittee is in the process of preparing proposed restyling changes to the Rules of Criminal Procedure and that he expect to submit a completed draft to the Committee by December 1, 1998.

Attachments:

A. Proposed Amendment to Rule 5(c).
B. Draft Minutes of April 1998 Meeting

Report to Standing Committee
Criminal Rules Committee
May 1998

EXHIBIT A

Rule 5. Initial Appearance Before the Magistrate Judge

* * * * *

(c) OFFENSES NOT TRIABLE BY THE UNITED STATES MAGISTRATE JUDGE. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial

appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, a federal magistrate judge may extend the time limits specified in this subdivision ~~may be extended~~ one or more times. ~~by a federal magistrate judge.~~ In the absence of such consent by the defendant, ~~time limits may be extended~~ a federal magistrate judge or ~~by~~ a judge of the United States may extend the time limits only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

ADVISORY COMMITTEE NOTE

The amendment expands the authority of a United States Magistrate Judge to determine whether to grant a continuance for a preliminary examination conducted under the Rule. Currently, the magistrate judge's authority to do so is limited to those cases in which the defendant has consented to the continuance. If the defendant does not consent, then the government must present the matter to a district court judge, usually on the same day. That procedure can lead to needless consumption of judicial resources and the consumption of time by counsel, staff personnel, marshals, and other personnel.

The proposed amendment currently conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only district court judges to grant continuances where the defendant objects. But the current distinction between continuances granted with or without the consent is an anomaly. While the magistrate judge is charged with making probable cause determination and other decisions regarding the defendant's liberty interests, the current rule prohibits the magistrate judge from making a decision regarding a continuance unless the defendant consents. On the other hand, it seems clear that the role of the magistrate judge has developed toward a higher level of responsibility for pre-indictment matters. Furthermore, the Committee believes that the change in the rule will provide greater judicial economy.

Report to Standing Committee
Criminal Rules Committee
May 1998

EXHIBIT B

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 27-28, 1998
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 27th and 28th 1998. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 27, 1998. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. John M. Roll
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. Alicemarie Stotler, Chair of the Standing Committee on Rules of Practice and Procedure; Hon. William Wilson, member of the Standing Committee and liaison to the Advisory Committee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. James Eaglin from the Federal Judicial Center; Mr. David Pimentel, Judicial Fellow at the Administrative Office; Mr. Joseph Spaniol, Consultant to the Standing Committee; and Ms. Mary Harkenrider from the Department of Justice. The attendees were welcomed by the chair, Judge Davis

II. HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee's regularly scheduled business meeting was preceded by a public comment hearing on proposed amendments to Rules 11 and 32.2, during which the Committee heard from four witnesses: Hon. Paul D. Borman (E.D. Mich.) who addressed the proposed amendments to Rule 11; Mr. Bo Edwards and Mr. David Smith, who spoke on behalf of the National Association of Defense Lawyers on proposed new rule 32.2; and Mr. Stephan Cassella who spoke on behalf of the Department of Justice on Rule 32.2.

III. APPROVAL OF MINUTES OF OCTOBER 1997 MEETING*

Judge Marovich moved that the Minutes of the Committee's October 1997 meeting in Monterey, California be approved. Following a second by Judge Roll, the motion carried by a unanimous vote.

IV. RULES APPROVED BY STANDING COMMITTEE AND JUDICIAL CONFERENCE AND PENDING BEFORE THE SUPREME COURT

The Reporter informed the Committee that at its January 1998 meeting, the Standing Committee had approved and forwarded to the Judicial Conference the amendments to the following rules, which were also approved by the Judicial Conference at its Spring 1998 meeting:

1. Rule 5.1 (Preliminary Examination; Production of Witness Statements);
2. Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings);
3. Rule 31 (Verdict; Individual Polling of Jurors);
4. Rule 33 (New Trial; Time for Filing Motion);
5. Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and
6. Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence).

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* Although some items on the agenda were discussed out of sequence, these Minutes reflect the Committee's discussion in the order the items were listed on its Agenda.

V. RULES PUBLISHED FOR PUBLIC COMMENT AND PENDING FURTHER REVIEW BY ADVISORY COMMITTEE

The Reporter informed the Committee that it had received a total of 24 written comments on the Committee's proposed changes to the following rules: Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment); Rule 7. The Indictment and Information (Conforming Amendment); Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.); Rule 24(c). Alternate Jurors (Retention During Deliberations); Rule 30. Instructions (Submission of Requests for Instructions); Rule 31. Verdict (Conforming Amendment); Rule 32. Sentence and Judgment (Conforming Amendment); Rule 32.2. Forfeiture Procedures; Rule 38. Stay of Execution (Conforming Amendment); and Rule 54. Application and Exception.

A. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)

The Chair provided background information on the development of the amendments to Rule 6, in particular the provision in Rule 6(d) for providing for interpreters in the grand jury deliberations. While the Advisory Committee had originally proposed that only interpreters for hearing impaired grand jurors be permitted, the Standing Committee had amended the Rule for publication to include all interpreters, in order to obtain public comment on the issue. The Reporter informed the Committee that of the comments received on that proposal, several judges opposed the amendment on the ground that 28 U.S.C. § 1385(b) requires that all petit and grand jurors must speak English. Thus, to the extent that the proposed rule permits language interpreters to take part in the deliberations, it is inconsistent with that statute.

Following brief discussion about extending the provision only to hearing and speech impaired jurors, Judge Carnes moved that the Rule be amended to provided for only those interpreters. Judge Roll seconded the motion, which carried by a unanimous vote.

With regard to the proposed amendment to Rule 6(f), which permits the foreperson or deputy foreperson of the grand jury to return an indictment on behalf of the grand jury, the Reporter noted that two commentators were opposed to the amendment on the ground that it unnecessarily insulates the grand jury from the court. Judge Miller seconded that view. Several other members indicated that although it might insulate the jurors, the rule gives discretion to the judge to require the jurors to personally appear and that it can be an effective cost and time-saving measure because the grand jurors do not have to wait until a judge is free from a busy docket to take the indictment.

Judge Dowd moved that the amendment be approved and forwarded to the Standing Committee as published. Judge Roll seconded the motion, which carried by a 9

to 2 vote.

B Rule 7. The Indictment and Information (Conforming Amendment).

The Reporter indicated that the Committee had received no written comments on the proposed conforming amendment to Rule 7 regarding forfeitures vis a vis the indictment. Judge Dowd moved that the amendment be approved and forwarded to the Standing Committee as published. Judge Miller seconded the motion, which carried by a vote of 9 to 2.

C. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.)

Following a brief discussion on the proposed amendment to Rule 11(a)(1), which is simply a technical change on the definition of an organizational defendant, Judge Dowd moved that the amendment be approved and forwarded as published. Following a second by Judge Roll, the Committee approved the amendment by a vote of 9 to 2.

The Reporter informed the Committee that of those commenting on the proposed change to Rule 11(c)(6)--which requires the judge to question an accused about any provision in a plea agreement which requires the accused to waive an appeal or collateral review of the sentence--a majority opposed the amendment, including several judges, the NADCL, and a committee of the American College of Trial Lawyers. The gist of the commentators' objections centers on opposition to the proposition that an accused could be required to waive an appeal of his her sentence and that by amending the Rule, the Committee is approving of that practice. The Chair indicated that the Committee could add a disclaimer to the Note and Judge Marovich stated that the purpose behind the proposal was to require a judicial inquiry into an existing practice in some districts, with or without the amendment. The discussion focused on the question of whether the practice was authorized and the role of the Committee, if any, in commenting on the legality of waiver provisions. Judge Carnes observed that some of the commentators had opposed the amendment to argue their substantive disagreement with the waiver provisions. He thereafter moved that the published amendment be approved and forwarded to the Standing Committee. Judge Marovich seconded the motion which carried by a vote of 9 to 2. The Committee also directed the Reporter to include removal of the final two sentences in the second paragraph of the Note and include language to reflect that the Committee did not intend to signal approval of wavier of appeal provisions.

With regard to the proposed amendment to Rule 11(e), the Reporter informed the Committee that only a few commentators had addressed the change, including the American Bar Association which believed the amendment would unduly bind the trial court to sentencing guidelines. Following a brief discussion, Mr. Martin moved, and

Judge Miller seconded, to approve and forward the amendment as published. The motion carried by a vote of 11 to 0. Judge Dowd moved that language be added to the Committee Note which pointed out that the trial judge retains discretion to reject the plea agreement. Professor Stith seconded the motion which also carried by vote of 11 to 0.

D. Rule 24(c). Alternate Jurors (Retention During Deliberations)

The Committee was informed that only six commentators had provided comments on the proposed amendment to Rule 24(c) which would permit the judge to retain any alternate jurors after the jurors retire for deliberations. Of those, three supported the amendment while the NADCL and the ABA are opposed to the change because there is currently no explicit provision in the rule permitting the judge to make substitutions after the jury retires. Following brief discussion, Mr. Josefsberg moved, and Judge Dowd seconded, that the Committee approve that amendment as published and forward it to the Standing Committee. The motion carried unanimously. The Committee also suggested some changes to the Note regarding the interplay between Rules 23 and 24.

E. Rule 30. Instructions (Submission of Requests for Instructions)

The Reporter informed the Committee that of the eight comments received on the proposed amendment to Rule 30--which would permit the judge to require the parties to submit their requested instructions pretrial. The amendment is opposed by the NADCL but supported by the American College of Trial Lawyers. The Reporter also indicated that the Civil Rules Committee is currently working on amendments to Civil Rule 51, a counterpart to Criminal Rule 30. That Committee was also considering possible amendments to clarify the provisions in that rule concerning preservation of error vis a vis instructions. Following discussion by the Committee to the effect that it would be better to hold Rule 30 and continue consideration of additional amendments, Judge Marovich moved that the amendment be tabled discussion at the Committee's next meeting. Justice Wathen seconded the motion, which carried by a vote of 9 to 2.

F. Rule 31. Verdict (Conforming Amendment).

The proposed amendment to Rule 31(e), which conforms the rule to proposed new rule 32.2 regarding forfeitures had received no comments. Judge Dowd moved that the amendment be approved and forwarded as published. Judge Miller second the motion which carried by an 8 to 3 vote.

G. Rule 32. Sentence and Judgment (Conforming Amendment)

The Reporter informed the Committee that it had received no written comments on the amendment to Rule 32(d), which conforms that rule to new Rule 32.2 (forfeiture procedures). Judge Dowd moved, and Judge Miller seconded, that the amendment be approved and forwarded to the Standing Committee. That motion carried by a 9 to 2 vote.

H. Rule 32.2. Forfeiture Procedures.

Judge Dowd, chair of the Rule 32.2 Subcommittee, moved that the rule be approved and forwarded to the Standing Committee; Judge Miller seconded the motion. Judge Dowd informed the Committee that the members of the subcommittee had focused on several potential problem areas or questions regarding the proposed draft. He noted that one of the key points was resolution of the right to jury trial, which existed under the current practice under Rule 31(e), which requires the jury to return a special verdict on the issue of forfeiture. Several members responded by noting that the proposal was linked with the Supreme Court's decision in *Libretti v. United States*, 116 S.Ct. 356 (1995). Several members read that case to say that there is no constitutional right to a jury trial in deciding criminal forfeiture issues. Others questioned whether, even assuming that was the Court's holding, it was wise to abrogate the existing system of involving the jury in the decision.

Other members raised concerns about the language in proposed subdivision (b) which indicated that the defendant was not permitted to show that the property belonged to someone else and that if no third party files a claim to the property to be forfeited, the rule assumes that the defendant's interest in the property was exclusive and the court could forfeit the property in its entirety. Judge Dowd submitted additional language proposed by the subcommittee which would address that issue. The new language, to be inserted at subdivision (b) would require the court, if no third party filed a claim, to determine if the accused had an interest in the property and the extent of the defendant's interest. The Committee agreed with the proposed addition.

Mr. Martin indicated that he opposed the proposed rule. In his view, the rule unnecessarily abrogated the right to jury trial.

Judge Stotler raised questions about whether the Federal Rules of Evidence applied at the ancillary proceeding under (d)(1). Following brief discussion, the Committee voted to add (d)(5) which would explicitly state that the ancillary proceeding is not a part of sentencing. As such, the Rules of Evidence would apply. The Subcommittee later submitted to the Committee proposed language which would clarify subdivision (f) which spells out the procedures for forfeiting subsequently discovered property or

substitute property.

The Committee voted 9 to 2 to approve new Rule 32.2, as amended, and forward it to the Standing Committee. The Reporter and the Subcommittee were asked to make the conforming changes to both the rule and the Note.

I. Rule 38. Stay of Execution (Conforming Amendment).

The amendment to Rule 38, which conforms the rule to proposed new Rule 32.2, received no written comments. Judge Dowd moved that the amendment be approved and forwarded to the Standing Committee. Ms. Harkenrider seconded the motion, which carried by a vote of 9 to 2.

J. Rule 54. Application and Exception.

Following a very brief discussion on the proposed amendment to Rule 54--a technical conforming amendment--Judge Dowd moved that the amendment to approved and forwarded to the Standing Committee. Judge Carnes seconded the motion which carried by a unanimous vote of the Committee.

VI CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 5(c). Initial Appearance Before the Magistrate Judge. Proposed Amendment.

Judge Davis provided a brief overview of a proposed amendment to Rule 5(c) which would permit a magistrate judge to grant a continuance in a preliminary examination over a defendant's objection. He noted that the Committee had previously considered the matter at its April 1997 meeting and that because the amendment would have directly contradicted 18 U.S.C. § 3060, that it had been referred to the Standing Committee with a recommendation that the Committee take steps to initiate an amendment to the statute. The Standing Committee responded by referring the proposal back to the Advisory Committee and indicating that the most appropriate method of effecting a change would be to follow the procedures in the Rules Enabling Act. At its October 1997 meeting, the Advisory Committee defeated a motion to amend Rule 5(c). Although that position was reported to the Standing Committee, the Judicial Conference subsequently instructed the Advisory Committee to propose an amendment.

Following discussion on the proposed amendment, Mr. Martin moved that Rule 5(c) be amended to permit a magistrate judge to grant a continuance in a preliminary hearing, over the objection of the accused. Judge Miller seconded the motion, which carried by a unanimous vote.

A discussion ensued addressing the issue of whether any proposed amendments should be published for comment in light of the fact that the Standing Committee's Style Subcommittee is currently working on restyling all of the Criminal Rules. A consensus emerged that unless an amendment was essential, it should be deferred pending the restyling project rather than going through piecemeal publication and amendments.

B. Rule 10, Arraignment & Rule 43, Presence of Defendant.

The Reporter presented proposed amendments on Rules 10 and 43 which would permit a defendant to waive personal appearance. The draft amendment would require the accused to waive that appearance in writing and would require approval of the court. Mr. Josefsberg moved that the draft be adopted and forwarded to the Standing Committee with a recommendation that it be published for public comment. Mr. Martin seconded the motion. During the discussion which followed, several members suggested that this amendment should perhaps wait until the Committee could more fully consider a possible amendment which would permit an accused to waive personal appearance for certain pleas, e.g., no contest pleas or pleas to a superseding indictment. The Committee voted unanimously to table the proposal. Mr. Martin and Judge Miller will work with the Reporter to consider additional amendments to the Rules.

C. Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition .

The Reporter submitted to the Committee a draft amendment to Rule 12.2 which reflected the Committee's discussions at its October 1997 meeting. Rule 12.2, would accomplish two results. First, a defendant who intends to introduce expert testimony on the issue of mental condition at a capital sentencing proceeding would be required to give notice of an intent to do so. And second, the rule would make it clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice.

The Reporter indicated that following the October 1997 meeting, the Department of Justice had submitted suggested language which also included suggested procedures for releasing the results of the examination to an attorney for the government before a guilty verdict on a capital crime had been returned. any procedure short of sealing the results of the examination might be appropriate. The Reporter continued by noting that he had

drafted some alternative language, which might better address the issue of disclosure of the results of the examination--assuming that the Committee decides to permit some form of early disclosure. He noted that the issue of disclosure raises several sub-issues: First, what dangers, if any, might be presented by releasing the results of the examination before the defendant has actually been convicted of at least one capital crime? Second, assuming that early disclosure is permitted, what standards should be used, if any, in deciding whether to release the results? Third, assuming early disclosure is permitted, should both sides be permitted to request such? And fourth, if the court is to consider the issue of whether the results of the examination will not tend to incriminate the defendant on the question of guilt or innocence, *see* Rule 12.2(c)(i), should the defendant be permitted to contest that averment. If so, wouldn't that require disclosure to the defendant beforehand?

Judge Carnes observed that currently, a court-ordered report is normally released when it is completed. And Mr. Pauley noted that the draft rule conforms to the prevailing, albeit limited, practice in the courts. Ms. Harkenrider discussed the various policy issues underlying the proposal and the need for some clarification of the trial court's authority in this area. During the discussion, several members raised concerns about the impact of the proposed amendments on the accused's self-incrimination and due process rights. Following additional discussion, a consensus emerged that further discussion of the amendments should be deferred until the Committee's Fall 1998 meeting. The Reporter was asked to research those constitutional concerns.

D. Rule 24(b). Trial Jurors. Proposed Amendment to Equalize Number of Peremptory Challenges.

Following a brief discussion about the background and history of various proposals concerning equalization of the number of peremptory challenges, the Reporter explained the proposed amendment to Rule 24(b) before the Committee. That draft reflected the vote of the Committee at its October 1997 meeting that each side should be entitled to 10 peremptory challenges in a felony case; that would increase the number of challenges available to the prosecution by four.

Judge Dowd moved that the proposed amendment to Rule 24(b) be approved and forwarded to the Standing Committee for publication. Judge Roll seconded the motion.

Judge Wilson indicated that he was opposed to the amendment; in his view, the amendment would give an advantage to the government and that the government does not always use all of its peremptory challenges. Judge Roll commented that in his experience, juries do not understand why the government has less challenges than the defense. Judge Dowd favored the proposal but Professor Stith observed that there might be potential problems. Mr. Josefsberg saw no problems with the current system and reminded the Committee that during the trial, the government has other advantages in the adversarial

aspects of the trial; he did not see where the current allocation of peremptory challenges disadvantaged the government. Judge Miller observed that providing for extra challenges would probably increase the number of jurors required for the pool and that in turn could increase trial costs.

Following additional brief discussion, the Committee voted 6 to 5 to approve the amendment, with the understanding that it should be deferred for publication until the restyling changes were also published--absent any compelling need for doing so sooner.

E. Rule 26. Taking of Testimony. Proposed Amendment to Permit Taking of Testimony from Remote Location.

The Reporter explained the draft amendments to Rule 26 which would permit the court to receive testimony from a remote location, via electronic video transmission. He noted that two drafts had been presented; the first favored deposition testimony over remote transmissions by requiring the court to first find "compelling circumstances" for using the remote transmission. An alternative draft, he noted, would place the remote transmission method on the same plane as a deposition. That is, the court would only need to first find that the witness was unavailable to testify in the court. Under both drafts the court would be required to establish adequate safeguards for the transmission. Judge Carnes expressed concern about the definition of the term "compelling circumstances." And Judge Roll asked what sort of safeguards the court might reasonably impose; the Reporter responded that taking steps to secure the transmission only for courtroom use would be an example. Mr. Pauley suggested that it would be helpful to continue the discussion at the Fall 1998 meeting. The Committee agreed.

F. Rule 32. Sentence and Judgment. Proposal by Committee on Criminal Law Regarding Disclosure of Presentence Reports.

Judge Davis pointed out that the Judicial Conference's Committee on Criminal Law is considering several options for dealing with disclosure of presentence reports to persons other the parties to the case. One of the options under consideration by that Committee is the adoption of a model local rule on the topic. The issue apparently arose from a question posed to the General Counsel's office. The question is whether any sort of rule or guideline should be promulgated which addresses the authority of the court to release the otherwise confidential report to someone other than the parties. The Reporter added that although the Committee has not been presented with any specific proposal for a local rule or a proposed change to Rule 32, the Committee might wish to at least take a position on whether it, at least in theory, supports such a change.

willing to take a risk and bear the burden on noncompliance with the conditions set by the magistrate.

Mr. Martin questioned whether a magistrate would realistically order forfeiture of a family home if an accused failed to meet the conditions of release. He recognized that the system tended to punish those friends and family members who have lost control over an accused. Judge Miller added that the practice had apparently been approved in some case law. Mr. Pauley indicated that if a forfeiture is later determined to be inappropriate there is a procedure for seeking remission. He added that the Department of Justice opposes the legislation and that permitting forfeiture for nonappearance can provide some protection for victims, from defendants who do not fear going to jail. Mr. Josefsberg expressed concern that there is a real risk that family members or friends who have posted bond will be harmed. He worried that some defense counsel might simply tell a surety to sign the bond without fully informing them of the problems that might follow if the defendant violates conditions of the bond.

Ms. Harkenrider expressed the view that threatening to forfeit a bond for having unauthorized contact with victims is beneficial; Judge Roll responded that he did not see witness intimidation as the real problem in these situations. Following additional brief discussion, Judge Marovich moved that the Committee adopt the language suggested by Congress--which would limit forfeiture of bonds to nonappearance only. Judge Roll seconded the motion. That motion failed by a vote of 5 to 6. In additional discussion, it was agreed that the vote expressed the Committee's opposition (by a narrow margin) to attempts to limit the magistrate's ability to order forfeiture of bond for conditions other than nonappearance.

K. Rule 49. Service and Filing of Papers. Proposed Amendment to Provide for Facsimile Transmission of Notice.

The Reporter informed the Committee that it had received a recommendation that Rule 49(c) be amended to permit courts to provide notice by facsimile transmissions. Similar amendments would be made to Appellate Rule 3(d) and Civil Rule 77(d). Judge Stotler informed the Committee that this proposal would probably require coordination with the technology subcommittee of the Standing Committee and require uniformity of language. She recommended that the item remain on the Committee's continuing agenda.

L. Rules Governing Habeas Corpus Proceedings; Report of Subcommittee.

Judge Carnes, chair of the habeas corpus rules subcommittee, reported that the subcommittee and conducted a preliminary review of the Rules Governing § 2254

Proceedings (State Custody) and § 2255 Proceedings (Federal Custody) and had prepared a written report with recommendations. He indicated that the subcommittee had focused not only on the potential inconsistencies in the time for filing responses, but also on the question of whether the rules should apply to § 2241 proceedings. Following additional discussion about other areas which might be studied, Judge Miller, a member of the subcommittee, indicated that he would poll magistrate judges on how they handle some of the issues raised in the discussion. The Reporter also suggested the possibility of merging all of the habeas rules into one set of rules. Judge Davis indicated that the matter would be on the agenda for the Committee's Fall 1998 meeting for further discussion.

VII. RULES AND PROJECTS PENDING BEFORE STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Rules Governing Attorney Conduct; Possible Amendments to Rules of Criminal Procedure.

Professor Coquillette, Reporter to the Standing Committee reported to the Committee that the Standing Committee was seeking the Advisory Committee's input on the adoption of a uniform set of rules to govern attorney conduct. That project had originated from Congress' general concerns in 1988 that there be a uniform set of rules governing local practice; that concern had led to what is referred to as the Local Rules Project. The focus was now on the issue of governing attorney conduct. He provided a brief overview of some of the problems that the federal courts and attorneys have faced in determining what particular rule of professional responsibility, might control in a particular instance. In particular he noted that the Department of Justice was interested in the issue of uniformity, given the fact that its attorneys may be subjected to inconsistent or conflicting rules of conduct.

He indicated that it appeared that there were basically three options for proceeding. The first option would be to adopt a single federal rule which would provide that the federal courts were bound by the state rules in which the court was located. That option had been labeled as the "Dynamic Conformity Rule." The second option would be to adopt a narrow set of core rules which would focus on particular federal court problems and leave the remainder of the issues to be resolved under state standards. In his view, this option would be narrower than what the federal courts currently have. The third option would be to adopt a complete set of Rules Governing Attorney Conduct for Federal Courts. So far, he said, there was not much support for this third option.

He suggested that the Committee consider several questions: First, which option would it tend to favor? Second, if a set of rules were to be adopted, how might they be incorporated, if at all, in the existing Rules of Procedure? And third, are there any technical suggestions which might inform the process of drafting and adopting new rules?

He added that he envisioned the formation of a special ad hoc committee composed of members from the Advisory Committees to consider the issues.

Several members recognized the problems that can arise at the trial court level and endorsed the general idea of resolving the problem. Following additional discussion, Judge Dowd moved that the Chair appoint two members to serve on an ad hoc committee. Judge Miller seconded the motion, which carried by a unanimous vote. The Committee took no position on whether to adopt a "dynamic conformity rule," a core set of rules, or a complete set of rules governing attorney conduct.

B. Local Rules Project; Effective Date for Rules.

The Reporter provided background information on a pending proposal before the Standing Committee that the respective rules of procedure be amended, in a uniform fashion, to provide that local rules be made effective on a set date each year and that a local rule not be effective until it had been received in the Administrative Office. Mr. Rabiej reported that the other Advisory Committees had not yet approved any particular language. It was decided to defer any further action on the matter pending the drafting of specific, uniform language.

C. Electronic Filing of Comments on Proposed Rules Changes.

Mr. Rabiej informed the Committee that the other Advisory Committees had approved a pilot program for receiving public comments on published rules via electronic mail services. Following a brief explanation of how the program would operate, the Committee approved the use of a two-year pilot program for receiving e-mail comments on the criminal rules.

D. Criminal Rule 27. Proof of Foreign Record.

Judge Stotler informed the Committee that the Federal Rules of Evidence Committee is considering an amendment to those Rules regarding proof of a foreign record--a topic currently covered at Civil Rule 44 and indirectly Criminal Rule 27. The Criminal Rule simply incorporates the civil rule regarding proof of such records. Following a brief discussion, it was the view of the Committee that the matter be continued on its docket pending any proposed amendments from either the Civil Rules or Evidence Rules Committee.

E. Status Report on Proposed Restyling of Criminal Rules.

The Reporter indicated that the Committee had been informed by Judge Parker, Chair of the Subcommittee on Style, that the subcommittee anticipated submitting its proposed changes to the Rules of Criminal Procedure on December 1, 1998. The restyled Appellate Rules are to go into effect on that same date, assuming that Congress makes no changes to the rules.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Chair reminded the Committee that its next meeting would be held on October 19th and 20th in Maine.

IX. ADJOURNMENT

The meeting was adjourned at 12:05 on Tuesday, April 28th, 1998.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Item 9A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
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PETER G. McCABE
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PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

TO: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Fern M. Smith, Chair
Advisory Committee on Evidence Rules

DATE: May 1, 1998

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules met on April 6th and 7th in New York City. At the meeting, the Committee approved three proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them for public comment.

The Evidence Rules Committee also discussed several proposals for amending other Evidence Rules. Specifically, the Committee considered: 1) whether the Evidence Rules should be revised to accommodate technological advances in the presentation of evidence; and 2) whether Evidence Rule 801(d)(1)(B) should be amended to provide a more expansive hearsay exception. The Committee also analyzed whether Civil Rule 44 should be abrogated in light of its apparent overlap with some of the Evidence Rules, and whether the Evidence Rules should be amended to include parent-child privileges. The Committee decided not to propose amendments on either of these subjects at this time.

The Committee considered three matters that do not relate directly to the Evidence Rules, but rather more broadly to the rulemaking process. These matters are: 1) whether comments on

the Rules should be received by e-mail; and 2) whether the rulemaking process should be shortened and, if so, how. Finally, the Evidence Rules Committee discussed and voted upon a suggested course for proceeding with the review of the proposed Rules of Attorney Conduct for the federal courts.

The discussion of these and other matters is summarized in Part III of this Report, and is more fully set forth in the draft minutes of the April meeting, which are attached to this Report.

II. Action Items

A. Rule 702.

The proposed amendment to Evidence Rule 702 is in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc*, and it attempts to address the conflict in the courts about the meaning of *Daubert*. The proposal is also a response to bills pending in Congress that purport to "codify" *Daubert*, but that, in the Committee's view, raise more problems than they solve. The proposed amendment specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony; requires a showing of reliable methodology and sufficient basis; and provides that the expert's methodology must be applied properly to the facts of the case. The Committee prepared an extensive Advisory Committee Note that will provide guidance for courts and litigants in determining whether expert testimony is sufficiently reliable to be admissible. Both the proposed amendment to Evidence Rule 702 and the Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 702 be approved for public comment.

B. Rule 701

The proposal to amend Evidence Rule 701 seeks to prevent the practice of proffering an expert as a lay witness and thereby end-running both the reliability requirements of Rule 702 and the disclosure requirements pertaining to expert testimony. Under the amendment, testimony cannot be admitted under Rule 701 if it is based on scientific, technical or other specialized knowledge. The language of the amendment intentionally tracks the language defining expert testimony in Rule 702. Both the proposed amendment to Evidence Rule 701 and the Advisory

Committee Note to the amendment are attached to this Report. The proposed amendment does not prohibit lay witness testimony on matters of common knowledge that have traditionally been the subject of lay opinions.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 701 be approved for public comment.

C. Rule 703.

The proposal to amend Evidence Rule 703 would limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion. Under current law, litigants can too easily evade an exclusionary rule of evidence by having an expert rely on inadmissible evidence in forming an opinion. The inadmissible information is then disclosed to the jury in the guise of the expert's basis. The proposed amendment imposes no limit on an expert's opinion itself. The existing language of Evidence Rule 703, permitting an expert to rely on inadmissible information if it is of the type reasonably relied upon by experts in the field, is retained. Rather, the limitations imposed by the proposed amendment relate to the disclosure of this inadmissible information to the jury. Under the proposed amendment, the otherwise inadmissible information cannot be disclosed to the jury unless its probative value in assisting the jury to weigh the expert's opinion substantially outweighs the risk of prejudice resulting from the jury's possible misuse of the evidence. Both the proposed amendment to Evidence Rule 703 and the Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 703 be approved for public comment.

III. Information Items

A. Issues the Committee Has Decided Not to Pursue

After discussion at the April meeting, the Evidence Rules Committee has decided not to pursue the following issues at this time:

1. Technological Advances in Presenting Evidence. The Evidence Rules Committee discussed whether the Evidence Rules must be amended to accommodate technological innovations in the presentation of evidence. The Committee studied the case law and determined that the Federal Rules are currently flexible enough to accommodate electronic evidence, and that courts and litigants have had little problem in applying the current rules to such evidence. For example, no case could be found in which computerized evidence was found inadmissible, where comparable non-computerized evidence would have been admitted, due to a limitation in the Rules. The Committee also found that any option for amending the Rules to more specifically cover computerized evidence would be problematic. Direct amendment of all the rules that refer to "paper"-type evidence would require the amendment of almost thirty rules--a prospect that should not be undertaken unless absolutely necessary. Indirect amendment of these rules--either by way of a freestanding definitions section, or by expanding the definitions section of the best evidence rule--presents substantial conceptual and practical problems as well. The Evidence Rules Committee resolved to continue to monitor case law and technological developments, and to reconsider the question of whether to amend the Rules should compelling circumstances dictate.

2. Rule 801(d)(1)(B): The Evidence Rules Committee considered a proposal to amend Evidence Rule 801(d)(1)(B) to provide a hearsay exemption for any prior consistent statement that would be otherwise admissible to rehabilitate a witness' credibility. Committee members generally agreed with the proposal on the merits, but resolved unanimously not to propose an amendment at this time. The Supreme Court, in *Tome v. United States,* recently construed Rule 801(d)(1)(B), and members wished to avoid the perception that the proposed amendment was designed to overrule *Tome*. Moreover, the Committee determined that the current Rule is not creating substantial problems in the federal courts. The Committee resolved to table the proposal, and will continue to monitor the post-*Tome* case law.

3. Civil Rule 44: The Evidence Rules Committee considered whether it should recommend that Civil Rule 44 be abrogated in light of its overlap with certain Evidence Rules. After substantial research and discussion, the Committee decided against such a recommendation. Civil Rule 44 does not completely overlap the Evidence Rules, and parties in certain types of cases rely on Civil Rule 44 as the sole means of authenticating official records. Since there is no indication of a problem in the cases, the Evidence Rules Committee found it inadvisable to propose any change in this area.

B. Parent-Child Privilege

Two bills are pending in Congress with respect to the possible amendment of the

Evidence Rules to include some form of parent-child privilege. The Senate Bill would require the Judicial Conference to report on the advisability of amending the Evidence Rules to include such a privilege. The House Bill would directly amend Evidence Rule 501 to provide a privilege for a witness to refuse to give adverse testimony, or relate confidential communications, concerning the witness' parent or child. The Evidence Rules Committee is unanimously opposed to amending the Evidence Rules to include any kind of parent-child privilege. If such a privilege were adopted, it would be the only codified privilege in the Federal Rules of Evidence--directly contrary to the common-law development of privileges that is the goal of Evidence Rule 501. Moreover, the Committee is convinced (along with the many federal courts that have considered the question) that children and parents do not rely on a confidentiality-based evidentiary privilege when communicating with each other. Nor has the case been made that the benefits of an adverse testimonial privilege outweigh the substantial cost to the search for truth that such a privilege would entail. The Evidence Rules Committee has prepared a draft statement in opposition to the House Bill, as well as a draft statement in response to the Senate Bill. Both of these statements recommend against an amendment of the Evidence Rules that would add a parent-child privilege. These draft statements are attached to this Report.

C. Proposed Rules of Attorney Conduct

The Evidence Rules Committee was directed, along with the other Advisory Committees, to consider and recommend an appropriate course of action with respect to the proposed Rules of Attorney Conduct. At its meeting, the Evidence Rules Committee noted that the Civil Rules Committee has resolved to recommend that an ad hoc committee, made up of representatives from the advisory committees, be formed to review the proposed Rules of Attorney Conduct. This review will consider the following questions:

1) Whether a "core" set of attorney conduct rules should be adopted for the federal courts, or whether the federal rule should be limited to a single choice of law provision.

2) Assuming that a core set of rules should be adopted, whether the rules as currently proposed fall within the core concern of the federal courts.

3) Whether the proposed rules or notes should be amended in any respect.

4) Whether the Attorney Conduct Rules should be established as a freestanding set of rules, or instead should be placed as an appendix to an existing body of Rules.

The Evidence Rules Committee strongly supports the proposal to establish an ad hoc committee to deal with these complex questions. The Evidence Rules Committee has already provided the Standing Committee's Reporter with extensive commentary and suggestions concerning each of the above issues, and hopes to continue its service by contributing to the work of the ad hoc committee.

D. E-mail Comments

The Standing Committee's Subcommittee on Technology has proposed a two-year trial period in which comments on the Rules could be made by e-mail. During this two-year period, Reporters would not be required to summarize individual comments; the Rules Support Office would acknowledge each comment by e-mail, and would post a generic explanation of action of the Advisory Committees in response to comments received. At its April meeting, the Evidence Rules Committee discussed the advisability of allowing e-mail comments, and unanimously resolved to support the proposal of the Technology Subcommittee.

E. Shortening the Rulemaking Process

At the request of the Standing Committee, the Evidence Rules Committee considered how and whether the rulemaking process could be shortened. The Committee unanimously agreed that the current process is too long, and that the length of the process encourages Congress to intervene with legislation rather than wait for the rulemaking process to come to its conclusion. The Committee recognized that much of the delay in the process is due to legislation specifying that the Supreme Court has until May 1 to transmit the rules to Congress, and that the Judicial Conference meetings are to be held in March and September. Yet even within those perameters, the Evidence Rules Committee thought it possible that changes could be adopted to shorten the process, without affecting the studied deliberation that is the hallmark of the rulemaking process. The Committee suggests that the Standing Committee might consider the following possibilities:

1. Shorten the six-month public comment period, at least with respect to changes that can reasonably be considered to be minimal or non-controversial.

2. Permit an Advisory Committee's proposal to be issued for public comment if the Standing Committee's only objections are on stylistic or drafting grounds. Any drafting problems could be corrected in the public comment process, thus shaving a year off what would be a four-year rulemaking process if the proposal were to be sent back to the Advisory Committee for redrafting. An alternative could be the approval of a policy permitting the Advisory Committee to respond to Standing Committee objections within 30 days of the Standing Committee meeting.

3. Permit the Advisory Committees to publish their proposals for public comment without the necessity of initial approval by the Standing Committee--while of course preserving the Standing Committee's ultimate authority to approve or disapprove a proposed rule after the

public comment period has concluded.

The Evidence Rules Committee agrees with the Standing Committee's self-study report that the current rulemaking process is too long, and the Committee is willing to participate in any suggestions or efforts to shorten the process.

IV. Minutes of the April, 1998 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April, 1998 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Rules and Committee Notes
Draft Statements Concerning Parent-Child Privileges
Draft Minutes

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 702

Rule 702. Testimony by Experts*

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise~~.~~, provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

* * * * *

COMMITTEE NOTE

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*. In *Daubert* the Court charged district judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony. The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. The Rule as amended provides that expert testimony of all types -- not only the scientific testimony specifically addressed in *Daubert*--presents questions of admissibility for the trial

* New matter is underlined and matter to be omitted is lined through.

court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. See *Bourjaily v. United States,* 483 U.S. 171 (1987).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are: (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community.

No attempt has been made to "codify" these specific factors set forth in *Daubert*. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other courts have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. See *Tyus v. Urban Search Management,* 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). See also *Kannankeril v. Terminix Int'l, Inc.,* 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

> (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying."

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See *General Elec. Co. v. Joiner,* 118 S.Ct. 512, 519 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. See *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). Compare *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). See also *Braun v. Lorillard Inc.*, 84 F.3d 230, 234 (7th Cir. 1996) (*Daubert* requires the trial court to assure itself that the expert "adheres to the same standards of intellectual rigor that are demanded in his professional work.").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended.

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner,* 118 S.Ct. at 519. Under the

amendment, as under *Daubert,* when an expert purports to apply principles and methods consistent with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. See *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether these principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994): "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

Daubert involved scientific experts, and the Court left open whether the *Daubert* standards apply to expert testimony that does not purport to be scientifically-based. The inadaptability of many of the specific *Daubert* factors outside the hard sciences (e.g., peer review and rate of error) has led some courts to find that *Daubert* is simply inapplicable to testimony by experts who do not purport to be scientists. *See Compton v. Subaru of Am., Inc.*, 82 F.3d 1513 (10th Cir. 1996) (*Daubert* inapplicable to expert testimony of automotive engineer); *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51 (2d Cir. 1993) (*Daubert* inapplicable to testimony based on a payroll review prepared by an accountant). Other courts have held that *Daubert* is applicable to all expert testimony, while noting that not all of the specific *Daubert* factors can be applied readily to the testimony of experts who are not scientists. See *Watkins v. Telsmith, Inc.*, 121 F.3d 985, 991 (5th Cir. 1997), where the court recognized that "[n]ot every guidepost outlined in *Daubert* will necessarily apply to expert testimony based on engineering principles and practical experience", but stressed that the trial court after *Daubert* is still obligated to determine whether expert testimony is reliable; therefore, "[w]hether the expert would opine on economic evaluation, advertising psychology, or engineering," the trial court must determine "whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers."

The amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping

function applies to testimony by any expert. While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. See *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. If there is a well-accepted body of learning and experience in the expert's field, then the expert's testimony must be grounded in that learning and experience to be reliable, and the expert must explain how the conclusion is so grounded. See, e.g., American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after* Daubert, 157 F.R.D. 571, 579 (1994) ("Whether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey one impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So

long as the principles and methods are sufficiently reliable, and so long as the proponent demonstrates that these principles and methods are applied reliably to the facts of the case, this type of testimony should be admitted.

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough!"). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. See *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded).

The amendment requires that expert testimony must be based upon reliable and sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the adequacy of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the ``reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. By its terms, Rule 703 does not regulate the basis of the expert's opinion per se. Rather, it regulates whether the expert can rely on information that is otherwise inadmissible. If the expert purports to rely on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied upon by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question of whether the expert is relying on a *sufficient* and reliable basis of information--whether admissible information or not--is governed by the reliability requirements of Rule 702.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 702

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony, such as are discussed in, e.g, Margaret Berger, *Procedural Paradigms for Applying the Daubert Test,* 78 Minn.L.Rev. 1345 (1994). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert.*, and it is contemplated that this will continue under the amended Rule. See, e.g., *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert". Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials,* 154 F.R.D. 537, 599 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 701

Rule 701. Opinion Testimony by Lay Witnesses*

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, ~~and~~ (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue~~.~~ and (c) not based on scientific, technical or other specialized knowledge.

* * * * *

COMMITTEE NOTE

Lay witnesses have often been permitted to testify on complicated, technical subjects. This permissiveness has created a problematic overlap between lay and expert witness testimony. See, e.g., *Williams Enters. v. Sherman R. Smoot Co.*, 938 F.2d 230 (D.C. Cir. 1991) (insurance broker, who might have been qualified as an expert, was permitted to testify that the construction collapse at issue may have contributed to a substantial increase in the plaintiff's insurance premiums). Some courts have found it unnecessary to decide whether a witness is offering expert or lay opinion, reasoning that the proffered opinion would be admissible under either Rule 701 or 702. See *Malloy v. Monahan*, 73 F.3d 1012 (10th Cir. 1996) (the plaintiff's testimony as to future profits was admissible under either Rule 701 or Rule 702); *United States v. Fleishman*, 684 F.2d 1329 (9th Cir.1982) (whether the testimony was lay or expert opinion, it was permissible for an undercover agent to testify that a defendant was acting as a lookout). Other courts have held that a witness need

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* New matter is underlined and matter to be omitted is lined through.

not be qualified as an expert where the opinion is helpful and admissible under Rule 701. See, e.g., *United States v. Paiva*, 892 F.2d 148, 156 (1st Cir. 1989) (Rule 701 ``blurred any rigid distinction that may have existed between" lay and expert testimony).

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing scientific, technical, or other specialized information to the trier of fact. See generally *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony on scientific, technical and other specialized knowledge through the rules governing expert testimony, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P.16 by simply calling an expert witness in the guise of a layperson. See Joseph, *Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure,* 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony", and that "the court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). See also *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").

The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. See, e.g, *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge is governed by the standards of Rule 702 and the

corresponding disclosure requirements of the Civil and Criminal Rules.

The phrase "scientific, technical or other specialized knowledge" is drawn from and is intended to have the same meaning as the identical phrase in Rule 702. See, e.g., *United States v. Saulter,* 60 F.3d 270 (7th Cir. 1995) (law enforcement agent was properly permitted to provide expert testimony on the process of manufacturing crack cocaine; his testimony was based on specialized knowledge). The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 703

Rule 703. Bases of Opinion Testimony by Experts*

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. If the facts or data are otherwise inadmissible, they shall not be disclosed to the jury by the proponent of the opinion or inference unless their probative value substantially outweighs their prejudicial effect.

* * * * *

COMMITTEE NOTE

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, it is the opinion or inference, and not the information, that is admitted as evidence. Courts have reached different results on how to treat otherwise inadmissible information that is reasonably relied upon by an expert in forming an opinion or drawing an inference. Compare *United States v. Rollins,* 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the statements of an informant), with *United States v. 0.59 Acres of Land,* 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken

* New matter is underlined and matter to be omitted is lined through.

differing views. *See, e.g.,* Ronald Carlson, *Policing the Bases of Modern Expert Testimony,* 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson,* 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is not independently admissible, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information on the other. If the trial court finds that the probative value of the information in assessing the expert's opinion substantially outweighs its prejudicial effect, the information may be disclosed to the jury, and a limiting instruction must be given upon request, informing the jury that the underlying information must not be used for substantive purposes. See Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances. Furthermore, the trial court must keep in mind that disclosure of the inadmissible information is permitted only if the probative value of the information, in the manner that it is disclosed to the jury, substantially outweighs its prejudicial effect.

The amendment governs the use before the jury of otherwise inadmissible information reasonably relied on by an expert. It is not intended to affect the admissibility of an expert's testimony, nor to deprive an expert of the use of inadmissible information to form and propound an expert opinion or inference. Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. See Rule 705.

The amendment provides a presumption against disclosure to the jury of otherwise inadmissible information used as the basis of an expert's opinion or inference, where that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

Item 9B

Proposed Response to Senate Bill on Parent-Child Privilege
Draft Judicial Conference Response

Date: April 7, 1998

The Federal Rules of Evidence should not be amended to include a parent-child privilege. An amendment would lead to uncertain application and inconsistent treatment of privileges, and would be costly to the search for truth.

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Congress rejected a detailed list of privileges in favor of a common law, case-by-case approach. Given this background, it is not advisable to single out a parent-child privilege for legislative enactment. Amending the Federal Rules to include a parent-child privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law. The Judicial Conference believes that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving testimony by parents against their children or children against their parents. Granting special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar. A specific legislative grant of a privilege might even be considered to create a negative inference that could limit judicial development of new privileges; such a negative inference would be directly contrary to the Supreme Court's directive that federal courts have the authority and obligation to create new privileges where warranted by reason and experience. *Jaffee v. Redmond,* 116 S.Ct. 812 (1996).

The adoption of a parent-child privilege would be contrary to both state and federal common law. All nine federal courts of appeals to consider the issue have rejected the parent-child privilege. See the cases collected in *In re Grand Jury,* 103 F.3d 1140 (3d Cir.), *cert. denied,* 117 S.Ct. 2412 (1997). Moreover, every state supreme court that has addressed the issue has rejected the privilege, and only four states have protected parent-child communications in some manner. Id. at 103 F.3d 1147-48. No state or federal law supports a privilege that would give a witness a right to refuse to give adverse testimony against their parent or child. This uniform authority counsels heavily against the legislative adoption of a parent-child privilege.

The Conference also notes that it would be difficult to define the appropriate contours of a parent-child privilege. Questions necessarily arise as to whether such a privilege should apply to protect adult children; grandparents; caretakers who have a "parental" relationship with a child; adoptive parents; or siblings. The difficulty in limiting the privilege counsels caution in adopting it.

For these reasons, the Judicial Conference recommends that the Federal Rules of Evidence not be amended to include a parent-child privilege. Sympathy alone is not enough to justify an unprecedented privilege that would, in many cases, prevent parties and the courts from reaching the truth. If family relationships are abused in an attempt to obtain evidence, "the remedy lies not in the adoption of an exclusionary rule, but instead in taking administrative or legal steps against those causing the abuse." David Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption,* 19 St. Mary's L.J. 35, 69 (1987).

Draft Statement in Response to H.R. 3577
Parent-Child Privilege

Date: April 7, 1998

H.R. 3577 would amend Federal Rule of Evidence 501 to provide for two privileges in the parent-child context. One privilege would protect a witness's refusal to testify against a parent or child of that witness. The other privilege would protect a witness's refusal to disclose the content of a confidential communication with a child or parent of that witness. We believe that the Federal Rules of Evidence should not be amended to include any kind of a parent-child privilege. An amendment would lead to uncertain application and inconsistent treatment of privileges, and would be costly to the search for truth.

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Congress rejected a detailed list of privileges in favor of a common law, case-by-case approach. Given this background, it is not advisable to single out a parent-child privilege for legislative enactment. Amending the Federal Rules to include a parent-child privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law. We believe that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving testimony by parents against their children or children against their parents. Granting special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar. A specific legislative grant of a privilege might even be considered to create a negative inference that could limit judicial development of new privileges; such a negative inference would be directly contrary to the Supreme Court's directive that federal courts have the authority and obligation to create new privileges where warranted by reason and experience. *Jaffee v. Redmond,* 116 S.Ct. 812 (1996).

The adoption of a parent-child privilege in any form would be contrary to both state and federal common law. All nine federal courts of appeals to consider the issue have rejected the parent-child privilege. See the cases collected in *In re Grand Jury,* 103 F.3d 1140 (3d Cir.), *cert. denied,* 117 S.Ct. 2412 (1997). Moreover, every state supreme court that has addressed the issue has rejected the privilege. Only four states have protected parent-child communications in some manner, and none as broadly as contemplated in H.R. 3577. Id. at 103 F.3d 1147-48. No state or federal law supports a privilege that would give a witness a right to refuse to give adverse testimony against their parent or child. This uniform authority counsels heavily against the legislative adoption of a parent-child privilege in any form.

We also note that the confidentiality-based privilege set forth in H.R. 3577 would be uncertain in application. The bill states that "a witness may not be compelled to disclose the

content of a confidential communication with a child or parent of the witness." This means that it is up to the witness to declare the privilege; if the witness wishes to disclose a confidence related by a parent or child, the person who communicated the confidential information cannot invoke the privilege. Thus, a person deciding whether to communicate to a parent or child in confidence can never be assured that the communication will remain protected. This lack of certainty is antithetical to the very policy of confidentiality-based privileges, which is to encourage confidential communications by providing certainty to the communicating party. As the Supreme Court has stated, an uncertain privilege "is little better than no privilege at all." *Upjohn Co. v. United States,* 449 U.S. 383 (1981).

The bill creates another anomaly by tying the parent-child privileges to the common-law development of the interspousal privileges. The privilege protecting confidential communications between spouses is controlled by the communicating spouse. A litigant has the right to invoke the privilege for confidential marital communications even if the witness wishes to disclose the communications. As discussed above, however, the confidentiality-based privilege for parent-child communications is, under H.R. 3577, controlled by the witness. If enacted, H.R. 3577 is therefore likely to create confusion and costly litigation by tying the parent-child confidential communications privilege to a purportedly "similar" privilege which is not in fact similar at all.

For these reasons, we recommend that the Federal Rules of Evidence not be amended to include a parent-child privilege. Sympathy alone is not enough to justify both an evasion of the Rules process and an unprecedented privilege that would, in many cases, prevent parties and the courts from reaching the truth. We are sympathetic to the concern that family relationships might be abused in the attempt to obtain evidence. However, if such abuse occurs "the remedy lies not in the adoption of an exclusionary rule, but instead in taking administrative or legal steps against those causing the abuse." David Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption,* 19 St. Mary's L.J. 35, 69 (1987).

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of April 6-7, 1998
New York, N.Y.

The Advisory Committee on the Federal Rules of Evidence met on April 6th and 7th at Fordham Law School in New York City.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair
Hon. David C. Norton
Hon. Milton I. Shadur
Hon. Jerry E. Smith
Hon. James T. Turner
Professor Kenneth S. Broun
Mary F. Harkenrider, Esq.
Gregory P. Joseph, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
Dean James K. Robinson
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. David S. Doty, Liaison to the Civil Rules Committee
Hon. David D. Dowd, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee
Roger Pauley, Esq., Justice Department
Sol Schreiber, Esq. Member, Standing Committee on Rules of Practice and Procedure
Peter G. McCabe, Esq. Secretary, Standing Committee on Rules of Practice and Procedure

John K. Rabiej, Esq., Chief, Rules Committee Support Office
Joe Cecil, Esq., Federal Judicial Center
Al Cortese, Esq., Product Liability Advisory Council

Opening Business

The Chair opened the meeting by asking for approval of the minutes of the October, 1997 meeting. These minutes were unanimously approved. The Chair noted with regret that Judge Shadur and Dean Robinson will be leaving the Committee. She thanked them for all their excellent service, and expressed her wish that they would attend the October, 1998 meeting.

The Chair then reported on actions taken at the January, 1998 Standing Committee meeting. The Standing Committee approved all of the Evidence Rules Committee's proposed amendments to be released for public comment. The proposed amendments are to Rules 103, 404(a), 803(6), and 902. The proposed amendments will be released for public comment on or about August 15, 1998.

Rule 702

Judge Shadur presented the report of the *Daubert* subcommittee, which was charged with the task of drafting proposed amendments to the rules on experts in light of the Supreme Court's decision in *Daubert*. Judge Shadur noted the basic premises from which the subcommittee began:

1. Any change in the rules should constitute a minimal departure from the existing language in the rules. Otherwise courts and litigants might think there is more change in the rule than there really is, and important precedent construing well-established language might be lost.

2. The trial court's gatekeeping function should apply to all expert testimony, not only scientific expert testimony.

3. Testimony that is functionally expert testimony should not be admitted under the more permissive standards of lay testimony under Rule 701.

4. Rule 703, which permits an expert to rely on inadmissible information, should not be used as a "backdoor" means of admitting otherwise inadmissible evidence.

Judge Shadur reviewed the subcommittee proposal for Rule 702. The proposal requires a determination of reliability at three distinct points. First, the opinion must be based on sufficient and reliable information. Second, the expert must employ reliable principles and methodology. Third, the expert must apply the principles and methodology reliably to the facts of the case.

Substantial discussion ensued on a number of possible modifications to the proposal. Among the possibilities discussed were:

1. Collapsing the three separate reliability requirements into one or two standards.

2. Changing the reference in the rule from "methodology" to "methods" and clarifying that the Rule is to apply to all expert testimony, including that of law enforcement agents in criminal cases.

3. Changing the reference from "principles and methodology" to "principles or methodology."

The Committee also considered the suggestions of the style subcommittee of the Standing Committee. The style subcommittee version collapsed the three separate reliability requirements into two, and the discussion among Committee members was that it was better to emphasize the three separate requirements of basis, principles/methodology, and application. Also, the style subcommittee version rewrote the entire rule, and the Committee was of the opinion that the existing language of the rule should be maintained to the extent possible.

Finally, the Committee reconsidered whether Rule 702 needed to be amended at all, and whether the subcommittee's version was an improvement on the existing rule. There was general agreement that Rule 702 needs to be amended, in light of the conflict in the courts over the meaning and application of *Daubert*, and particularly in light of congressional attempts to amend Rule 702 with problematic language.

A motion was made to adopt the subcommittee's proposed amendment of Rule 702, as amended in the course of Committee discussion, and to recommend to the Standing Committee that the proposal be issued for public comment. This motion was approved with nine in favor and one dissent.

The Committee then turned to the draft Advisory Committee Note to Rule 702. Several stylistic suggestions were made and adopted, and language was included to clarify that the phrase "principles and methods" was not intended to preclude the testimony of law enforcement agents in criminal cases. Further language was added to clarify that the reference in the rule to "facts or data" is intended to permit an expert to rely on opinions of other experts.

A motion was made to adopt the Advisory Committee Note to Rule 702 as amended. This motion was unanimously approved.

A copy of the proposed amendment to Rule 702, and the proposed Advisory Committee Note to Rule 702, is attached to these minutes.

Rule 701

Judge Shadur presented the proposal of the *Daubert* subcommittee, which would preclude the use of Rule 701 if the witness' testimony relies on "scientific, technical or other specialized

knowledge". The proposed language is intended to track that of Rule 702. The goal of the amendment is to channel all expert testimony into Rule 702, thus preventing a party from evading the expert witness disclosure and reliability requirements through the artifice of proffering an expert as a lay witness.

Members of the Justice Department opposed the proposal. They suggested that the term "specialized knowledge" is vague, and that many reversals will occur when trial courts characterize testimony as not based on specialized knowledge when in fact it is. They also questioned whether Rule 702 should apply when the witness, who is testifying to what a lay witness could testify to, is in fact an expert. For example, what if a family friend, who gives an opinion on the competence of an individual, happens to be a psychiatrist?

Several members of the Committee responded to these concerns. They observed that the proposal does not distinguish between types of witnesses but rather between types of testimony. Thus, a family friend who is a psychiatrist need not be qualified as an expert in giving lay opinion testimony as to the competence of a friend. If, however, the proponent emphasizes the witness' specialized training or expertise, then it is only fair that the proponent should qualify the witness as an expert. Committee members pointed out that the proposed amendment will not have a substantial effect on trial practice. A proponent who wants to rely on a witness' expertise would need to establish a foundation even if Rule 701 were not amended.

Concern was also expressed that under the amendment, witnesses would often be precluded from testifying because of a party's failure to comply with the disclosure obligations of Civil Rule 26. The response was that if a witness is not specially retained as an expert, Rule 26 poses no extra discovery obligations; and if the witness *is* specially retained to give what is tantamount to expert testimony, then it is inappropriate to evade the Rule 26 disclosure requirements by proffering the witness under Rule 701. It was also observed that the rule change would actually benefit lawyers, by requiring them to determine in advance whether a witness would qualify as an expert.

One member suggested, as an alternative, that a gatekeeping function, similar to that of Rule 702, be placed in Rule 701. But it was observed that this would not be an improvement on the proposal. A gatekeeping function could not apply readily to most witness testimony that is truly lay testimony--e.g., "the car was speeding." This means that a distinction would have to be made between prototypical lay witness testimony and testimony based on scientific, technical or other specialized knowledge. Thus the same problem of distinguishing between lay and expert testimony will arise if a gatekeeping function were placed in Rule 701. Moreover, the subcommittee's proposed amendment to Rule 701 has two purposes--to assure that all witness testimony based on specialized knowledge is reliable, and to assure that all such testimony is subject to the disclosure obligations applicable to experts under Civil Rule 26 and Criminal Rule 16. Importing a gatekeeping function into Rule 701 might effectuate the former goal, but it would do nothing to effectuate the latter, because the disclosure rules cover only testimony that is offered under Evidence Rule 702.

The Committee considered the proposal of the Standing Committee's Subcommittee on Style. This proposal approved the language added by the *Daubert* Subcommittee, but restructured the existing rule. Committee members generally agreed that it would be better to preserve the existing language, and substantial precedent thereunder, to the extent possible.

A motion was made to adopt the *Daubert* Subcommittee proposal to amend Rule 701, and to recommend to the Standing Committee that the proposal be issued for public comment. Eight members voted in favor, one against, and one abstained.

The Committee moved on to the proposed Advisory Committee Note to an amended Rule 701. The Note emphasizes that the amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. It specifies that any part of a witness' testimony based on scientific, technical or specialized knowledge is subject to the reliability requirements of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules. At the suggestion of some Committee members, a paragraph was added to the Note to indicate that the term "specialized knowledge" is taken from and intended to have the same meaning as the identical phrase in Rule 702. The added language also clarifies that the amendment is not intended to effect prototypical lay witness testimony, such as opinions concerning sound, size, distance, etc.

A motion was made to adopt the Advisory Committee Note to Rule 701, as amended. Eight members voted in favor, one against, and one abstained.

A copy of the proposed amendment to Rule 701, and the proposed Advisory Committee Note, is attached to these minutes.

Rule 703

Judge Shadur presented the proposal of the subcommittee to amend Rule 703. The amendment would, in certain circumstances, prevent the disclosure to the jury of inadmissible information relied on by an expert in reaching an opinion. Judge Shadur observed that the goal of the proposed amendment is to prevent the use of Rule 703 as a backdoor means of admitting otherwise inadmissible evidence. However, Judge Shadur and many other members expressed concern with the subcommittee's invocation of Rule 403 as the means to keep out otherwise inadmissible evidence. There was general agreement that the Rule 403 test, which presumes admissibility, would not be protective enough. Therefore, Committee members suggested that the subcommittee's proposal be changed to provide that otherwise inadmissible information relied upon by an expert can only be disclosed to the jury if the probative value of the information substantially outweighed its prejudicial effect.

Concern was expressed that a simple reference to probative value and prejudicial effect would be too vague, and that the rule should specify how the otherwise inadmissible information

could be probative and how it could be prejudicial. Several Committee members responded to this criticism by noting that there is no such specification in any other Evidence Rule that provides for a balancing of probative value and prejudicial effect. Moreover, the Committee Note sets out the relevant factors.

One Committee member suggested that it might be problematic to refer specifically to the jury in the Rule, because the Evidence Rules are generally applicable to both judge and jury trials. Other Committee members responded, however, that Rule 403 itself specifically mentions the risk of misleading the jury, and that the very point of the amendment to Rule 703 is to prevent a proponent from using the Rule as a backdoor means of getting otherwise inadmissible information before the jury. No such concern arises in a bench trial.

The Committee considered whether the proposed language, as amended, would be better placed in Rule 705, which specifically deals with disclosure of an expert's basis of information. But it was generally agreed that the problem of disclosure of otherwise *inadmissible* information to the jury has been treated under Rule 703, and therefore that amending Rule 705 rather than Rule 703 would cause confusion.

Committee members generally agreed that the Rule should make clear that the limitation on admitting evidence under Rule 703 should apply only to the proponent of the expert. The adversary should be free to permit the jury to consider any aspect of an expert's basis. The subcommittee proposal was therefore modified to clarify that the limitations in the Rule applied only when the proponent of the expert offered otherwise inadmissible information relied upon by that expert.

Finally, the Committee considered the suggestions of the Standing Committee's Subcommittee on Style. The Committee again decided against any attempt to change or restructure the existing language in the rule.

A motion was made to adopt the *Daubert* Subcommittee's proposal to amend Rule 703, as modified, and to recommend to the Standing Committee that the Rule be issued for public comment. Eight members voted in favor and two dissented.

The Committee then discussed the proposed Advisory Committee Note to Rule 703. It was suggested that a paragraph be added to the Note to clarify that the reference in the Rule to the "proponent" would apply in multiparty cases to all parties similarly situated to the party who actually calls the expert. A motion was made to adopt the Committee Note, as modified. The motion was unanimously approved.

Attorney Conduct Rules

The Chair noted that the Civil Rules Committee at its recent meeting recommended that an ad hoc committee, made up of two representatives from each of the advisory committees, be

formed to consider the proposed Federal Rules of Attorney Conduct. The Evidence Rules Committee unanimously agreed with the recommendation of the Civil Rules Committee. The Chair appointed Judge Jerry Smith and the Reporter to serve as representatives to the ad hoc committee.

A short discussion ensued on some of the issues that the ad hoc committee would have to work through. Several Committee members expressed concern about the current version of proposed Rule 10, which permits the government to contact represented parties in certain circumstances. These members were of the opinion that the current version of Rule 10 was too permissive and would permit government overreaching. Professor Coquillette, the Reporter to the Standing Committee, noted that the Attorney Conduct Rules are still a work in progress, and whether or not Rule 10 is adopted, the rulemaking project will have a salutary effect in that it will bring some type of uniformity (whether horizontal or vertical) to the rules of professional responsibility in the federal courts. Professor Coquillette expressed support for an ad hoc committee, noting that significant thought must given to whether the proposed Rules should be adopted and whether they need modification. This work is better done by an ad hoc committee than by each of the Advisory Committees as a whole. Professor Coquillette noted that the Criminal Rules Committee has also agreed with the ad hoc committee approach.

Professor Coquillette expressed his thanks to the Evidence Rules Committee for the substantial work that it has already done on the Attorney Conduct Rules. The Evidence Rules Committee has provided a detailed list of suggestions as to how the proposed Attorney Conduct Rules and commentary can be improved, and these suggestions have been incorporated into the latest working draft of the Rules.

Uniform Rules

Professor Whinery, the Reporter for the Uniform Rules of Evidence Drafting Committee, reported on developments in the Uniform Rules project. The first reading of the working draft will be made this summer at the national meeting of the Uniform Laws Commissioners. The Uniform Rules Committee has generally followed the Federal Rules of Evidence, but Professor Whinery noted that there are some marked differences. For example, Proposed Uniform Rule 702 establishes a presumption of admissibility for expert testimony that passes the *Frye* test, and a presumption of inadmissibility for expert testimony that does not. Then the Rule provides a number of factors that would be relevant to overcoming the presumption one way or another. Also, the Uniform Rules have been amended throughout to update language that might not accommodate the presentation of evidence in electronic form.

Parent-Child Privileges

The Committee reviewed two bills pending in Congress concerning parent-child privileges. The Senate Bill would direct the Judicial Conference to advise Congress on whether the Federal Rules of Evidence should be amended to include some kind of parent-child privilege.

The House Bill would directly amend Evidence Rule 501 to provide a partial privilege for confidential communications between parent and child, and to provide a privilege for a witness to refuse to give testimony against a parent or child.

The Chair expressed concern over what seems to be a piecemeal approach to privileges on the part of Congress. Instead of systematically reviewing the law of privileges, proposals to legislate new privileges seem to proceed on an ad hoc basis in response to newsworthy events. One Committee member noted that some prosecutions tried before him could not have been brought if a parent-child privilege had been in existence.

The Committee approved language that might be used in a letter to Congress in opposition to any kind of parent-child privilege. This language will be referred to the Chair of the Standing Committee, should it be considered appropriate to respond to either of these bills.

Rule 801(d)(1)(B)

The Committee considered a proposal by Judge Bullock, the liaison to the Standing Committee, to amend Evidence Rule 801(d)(1)(B). In response to Judge Bullock's suggestion, the Reporter prepared a proposed amendment to the Rule that would provide a hearsay exemption for any prior consistent statement that would otherwise be admissible to rehabilitate a witness' credibility. In support of the proposal, Judge Bullock noted that the distinction between substantive and rehabilitative use of prior consistent statements is less than clear and is usually not grasped by jurors. Jurors can, however, assess credibility, so it arguably makes no sense to instruct the jury that a prior consistent statement can be used for credibility but not for its truth.

Committee members generally agreed with the proposal on the merits, but resolved unanimously not to propose an amendment at this time. The Supreme Court, in *Tome v. United States,* recently construed Rule 801(d)(1)(B), and members wished to avoid the perception that the proposed amendment was designed to overrule *Tome*. The Chair observed that the Uniform Rules draft codifies *Tome*, thus bringing the Uniform Rules in line with current federal law. Such salutary uniformity should not be disturbed unless the current rule has created substantial problems for courts and litigants. Under the current Rule, the worst thing that happens is that the jury receives an instruction that has little effect. The Reporter noted that the current Rule is not creating substantial problems in the federal courts. The Committee resolved to table the proposal, and directed the Reporter to monitor the post-*Tome* case law.

Computerized Evidence

At the October, 1997 Evidence Rules Committee meeting, the Reporter was directed to report at the next meeting on whether the Evidence Rules need to be amended to accommodate technological advances in the presentation of evidence. For the April, 1998 meeting the Reporter provided the Committee a memorandum, noting that more than twenty Evidence Rules have language that refer to "paper-oriented" evidence, e.g., "record", "memorandum", etc. Arguably,

these Rules might be problematic for a proponent who wishes to proffer computerized evidence. The Reporter reviewed the case law, however, and concluded that the courts are handling computerized evidence quite well under the broad and flexible Evidence Rules. Committee members expressed the view that tinkering with language may create rather than solve problems, especially since the current rules seem to be working well. One Committee member noted that the same concerns about technology might have been raised years ago with videotaped presentations; yet the federal courts have had no problem in handling videotaped evidence under the current rules.

It was also observed that any attempt to amend the rules to accommodate electronic evidence would have to proceed along one of three paths, each of which is problematic. One possibility is that each of the problematic rules could be amended directly; but this would mean that more than twenty rules amendments would have to be proposed. Alternatively, the definitions section of Evidence Rule 1001 could be modernized to apply to all the other Rules. The problem with this solution would be that the definitions section would be in the Best Evidence Rule--not the first place a lawyer would look for it. A third possibility would be to add an independent definitions section to the Evidence Rules. But to do that just for computerized evidence would be odd; on the other hand, it would certainly not seem worth the effort to promulgate an all-encompassing definitions section, after 25 years of litigation under the Evidence Rules without such a section.

The Committee unanimously agreed that it would not at this time recommend any amendment to the Evidence Rules with respect to computerized evidence. The Reporter agreed to monitor developments in the case law concerning computerized evidence.

E-mail Comments

The Committee addressed a proposal by the Standing Committee Subcommittee on Technology, for a two-year trial period in which comments on the Rules could be made by e-mail. During this two-year period, Reporters would not be required to summarize individual comments; the Rules Support Office would acknowledge each comment by e-mail, and would post a generic explanation of action of the Advisory Committees in response to comments received. Committee members expressed some concern as to how an e-mail comment system would work. Concern was also expressed that comments made by e-mail may not be as careful and considered as comments by mail. On the other hand, the Committee noted that substantial benefits could accrue from greater public input into the Rules process, and that in the long run it might be easier to respond to e-mail comments than to written comments. The Committee unanimously resolved to support the proposal of the Technology Subcommittee for a trial period for e-mail comments.

Civil Rule 44

At the October, 1997 meeting, the Reporter was directed to consider whether Civil Rule

44 should be abrogated in light of its overlap with certain Evidence Rules providing for authentication of official records--especially Evidence Rule 902. The Reporter conferred with the Reporter to the Civil Rules Committee, researched the relevant case law, and analyzed Civil Rule 44 and its relationship to the Evidence Rules in substantial detail. The Reporter provided the Committee with a memorandum on the subject for the April meeting. That memorandum came to the following basic conclusions: 1. Courts and litigants have not had a problem with the overlap between Civil Rule 44 and the Evidence Rules. 2. In some cases, especially in deportation proceedings, Civil Rule 44 is relied upon as a means of authenticating official records, without reference to the Evidence Rules; while this may not be necessary, any repeal of Civil Rule 44 would upset settled expectations in these areas. 3. There are a few situations in which authentication might be permitted under Civil Rule 44 and not under the Evidence Rules. 4. Abrogation of Civil Rule 44 would also affect the Bankruptcy Rules and the Criminal Rules, both of which refer to Rule 44.

After considering the Reporter's memorandum, and the fact that no problems have been created by the coexistence of Civil Rule 44 and the Evidence Rules, the Committee decided unanimously not to proceed with any effort to abrogate Civil Rule 44.

Shortening the Rulemaking Process

At the request of the Standing Committee, the Evidence Rules Committee considered how and whether the rulemaking process could be shortened. There was general concern that the process is too long, and that the length of the process encourages Congress to intervene with legislation rather than wait for the rulemaking process to grind to its conclusion. While it is often proclaimed that the process needs to be as long as it is to assure careful deliberation, the fact is that much of the time in the process is simply waiting time in which no cognitive thought is given to the rules. For example, the Evidence Rules Committee's proposals to amend Rules 103, 404, 803(6) and 902 were approved in January by the Standing Committee to be issued for public comment--yet the public comment period does not begin until August 15th.

John Rabiej noted that much of the problem with the length of the process is due to legislation specifying that the Supreme Court has until May 1 to transmit the rules to Congress, and that the Judicial Conference meetings are to be held in March and September. This adds a number of months to the process because the Judicial Conference can only propose rules changes after its September meeting--proposing rules changes after the March Judicial Conference meeting would not give the Supreme Court enough time to consider the changes.

One possibility considered by the Committee is to shorten the six month public comment period. This solution might be especially fruitful with respect to technical or non-controversial changes. Many members believed that a two-tier structure might work: a six month comment period for substantial or controversial rules changes, and a much shorter period for technical or non-controversial changes.

The Reporter noted that the rules process can actually take longer than three years. He pointed out that the Evidence Rules Committee's proposal to amend Evidence Rule 103 was delayed for an entire year because the Standing Committee sent it back to the Evidence Rules Committee for redrafting. The Standing Committee had no apparent substantive concerns with the proposal. It was suggested that if the Standing Committee's only objections to an Advisory Committee proposal are on stylistic or drafting grounds, then the proposal should be issued for public comment. Any drafting problems can be corrected in the public comment process, thus shaving a year off what would otherwise be a four-year rulemaking process. The Committee was in unanimous agreement that drafting objections should not delay the release for public comment of a proposed rule. The Committee was also favorably disposed to two alternative proposals: 1. A policy permitting the Advisory Committee to respond to Standing Committee objections within 30 days of the Standing Committee meeting.2. A policy permitting Advisory Committees to publish their proposals for public comment without the necessity for approval by the Standing Committee.

The Evidence Rules Committee generally agrees with the self-study report that the current rulemaking process is too long, and the Committee expressed its interest and willingness to participate in any suggestions or efforts to shorten the process.

New Matters

A Committee member suggested that the Committee might consider how the scope provisions of Rule 1101 are operating. In particular, the Committee might look at whether the exclusions provided in Rule 1101 are necessary, or whether it might now be appropriate to extend the applicability of the Federal Rules to certain other proceedings. The Reporter agreed to investigate the subject and report to the Committee at the next meeting.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for October 22nd and 23rd in Washington, D.C. The Committee agreed that if its proposals to amend Rules 701-703 are issued for public comment, the first day of the meeting will be a public hearing on these Rules.

The meeting was adjourned at 10:45 a.m., Tuesday, April 7th

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

Item 10

BOSTON COLLEGE

J. DONALD MONAN, S.J. PROFESSOR
LAW SCHOOL

To: Committee on Rules of Practice and Procedure

From: Daniel R. Coquillette, Reporter

Date: May 18, 1998

STATUS REPORT ON PROPOSED RULES GOVERNING ATTORNEY CONDUCT

I. Introduction

At the January 8, 1998 meeting of the Committee on Rules of Practice and Procedure ("Standing Committee"), I was asked to circulate drafts of a proposed new F.R. Civ. P. 83(c) and F.R. App. P. 46(d), together with a draft Federal Rules of Attorney Conduct, and an explanatory cover memo to each of the Advisory Committees for their suggestions and criticisms of the major policy issues involved. A copy of my memorandum to each of the Chairs and Reporters of the Advisory Committees is attached as "Appendix I" to this Report.

II. Report

Each of the Advisory Committees discussed these drafts at their spring meetings, and have come to a common conclusion: that the issues involved are sufficiently complex and controversial that they are not manageable through the ordinary Advisory Committee agenda. Instead, each Advisory Committee voted to appoint two members, with special expertise or interest in attorney conduct, to serve as an ad hoc Committee on Attorney Conduct under the leadership of the Chair and Reporter of the Standing Committee. The Department of Justice will be invited to designate a representative. This Special Committee is expected to meet during the fall, and report to the Advisory Committees at their Spring, 1999 meetings, with the hope of having recommendations to the Standing Committee for its June 1999 meeting.

This timing also accommodates three other important initiatives: 1) The ABA Ethics 2000 Commission; 2) the ALI Restatement of the Law Governing Lawyers; and 3) the Federal Judicial Conference Study of Attorney Conduct in the Bankruptcy Courts, as requested by the Bankruptcy Advisory Committee. (Two members of the Standing Committee, Chief Justice Norman Veasey and Geoffrey C. Hazard are expert as to the ABA and ALI initiatives.) There was a wide consensus that any Rules Enabling Act

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initiatives should proceed with care and due deliberation, and should be coordinated with these other initiatives. This agenda also permits time for the Conference of Chief Justices to complete negotiations with the Department of Justice on an acceptable version of ABA Model Rule 4.2, which could possibly be incorporated in a system of uniform federal rules.

In addition, three other new developments have made such a Special Committee desirable. First, the ABA is considering promulgating "Guidelines for Conduct," similar to the "Standards" of the Court of Appeals, Seventh Circuit. By letter of March 12, 1998, it was suggested by a representative of ABA President Shestack that "the Judicial Conference give consideration to adopting a model civility code or taking other measures to emphasize the importance of and to enhance civility among participants in the judicial process." See Appendix II, infra. In addition, the Committee on Case Management and Court Administration ("CACM") has requested the Standing Committee's comments on their proposed "Ethical Principles for ADR Neutrals in Court-Annexed ADR Programs." See Appendix III, infra. Finally, the National Bankruptcy Review Commission ("NBRC") established by the Bankruptcy Reform Act of 1994, has recommended "national [lawyer] admission in bankruptcy courts." (See NBRC Recommendation 3.3.4.) This recommendation is being reviewed by CACM, which has indicated that it will request advice from the Standing Committee as to the effect of the Recommendation 3.3.4 on local and national rules.

Each of these three developments above has the potential, if done inexpertly, for encouraging local rulemaking by federal district courts in the area of attorney conduct, thus increasing the scope of federal rulemaking at the expense of the state rules, and also increasing the inconsistency between federal district court rules. (For example, a number of states have proposed civility guidelines, and many state rule systems govern the use of lawyer neutrals in ADR proceedings.) A Special Committee could clearly assist the Standing Committee in responding appropriately to these important developments.

Finally, at the invitation of the Honorable Stephen H. Anderson, Chair of the Committee on Federal-State Jurisdiction, Judge Stotler and I will be attending their next meeting in Washington on June 15, 1998. The President of the Conference of Chief Justices will also be attending. We hope to give a brief presentation, and then receive suggestions. I have also been asked to address the ABA's 24th National Conference on Professional Responsibility and the 14th National Forum on Client Protection at Montreal on May 28, 1998 on this subject. Doubtless, a great deal will be learned from these meetings. I will make full reports to both the Standing Committee and to any new Special Committee.

III. Conclusion

I would strongly advise that the Standing Committee approve the unanimous request of the Advisory Committees, and recommend the establishing of a Special Committee as described above.

Dan Coquillette

Daniel R. Coquillette
Reporter

Appendix I

Memorandum from the Reporter to the Chairs
and Reporters of the Advisory Committees,
February 11, 1998

TO: Chairs and Reporters, Advisory Committees

FROM: Daniel R. Coquillette
Reporter, Standing Committee

CC: Hon. Alicemarie Stotler, Chair
Standing Committee

DATE: February 11, 1998

RE: Federal Rules of Attorney Conduct

I. Introduction

The Standing Committee is charged by 28 U.S.C. § 2073 (b) "to maintain consistency" among the federal rules and "otherwise promote the interest of justice." Attorney conduct in the federal courts is now governed by literally hundreds of local rules, many of which are inconsistent with each other and with the rules of the relevant state courts. Our studies show a genuine and persistent problem, at least in district and bankruptcy courts. Whether the Congress will subscribe to any additional national rules is an issue to be met in the future, but federal rules regulating attorney conduct already exist in abundance. Moreover, the ABA, through its "Ethics 2000" Project, has expressed initial concern about the relationship between state and federal rules governing attorney conduct, a concern also shared by the Department of Justice and the Conference of Chief Justices, although these three entities may have very different views about appropriate solutions.

II. Status

As you know, the Standing Committee voted at its January 8-9, 1998 meeting to refer the draft Federal Rules of Attorney Conduct to the Advisory Committees for comment. At the suggestion of the Honorable Alicemarie Stotler, Chair, I am writing to indicate what help is expected from the Advisory Committees.

With this memo, you should receive two additional items for circulation to your Committees: 1) a memorandum from me to the Standing Committee of December 1, 1997, describing the fundamental options before the Committees (hereafter "Options Memo") and 2) a draft set of Federal Rules of Attorney Conduct, slightly amended for technical reasons from the set distributed with the Standing Committee Agenda in January (hereafter the "Draft Rules").

You will also recall a discussion about whether such Federal Rules of Attorney Conduct, if adopted through the Rules Enabling Act, would be best enacted as a free

standing set of federal rules, or included as an appendix to the Federal Rules of Civil Procedure. The advice of your committees is being sought on this issue. To aid discussion, a draft of possible amendments to Fed. R. Civ. P. 83 (1) and Fed. R. App. P. 46 is included. In addition, the "Options Memo" includes a possible amendment to Fed. R. Crim. P. 57 (d), at page 3.

Finally, every member of your Committees should have received a copy of the Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (September, 1997). These Working Papers include seven extensive studies prepared by me and by the Federal Judicial Center over a four year period, including studies specially focused on Courts of Appeals (Study V, June 20, 1997) and on Bankruptcy Cases (Study VI, June 20, 1997). The "Options Memo" and the "Draft Rules" are cross-referenced throughout to these Working Papers.

III. What is Expected of the Advisory Committees?

The Standing Committee has been reviewing four different options, and has not yet decided which one to pursue. See Options Memo, pages 1-2. One option is to do nothing. A second is to adopt a single uniform federal rule that adopts the current rules of the relevant state courts as the federal rule in the district courts, with a "choice of law" rule for courts of appeals. This, the so-called "dynamic conformity" option, could be achieved by just adopting Rule 1 of the draft Federal Rules of Attorney Conduct. A third option is to apply state standards to all but a "core" of federal rules narrowly drafted to cover only attorney conduct before federal judges or closely related to federal proceedings. (This could be achieved by adopting all ten of the draft Federal Rules of Attorney Conduct.) A fourth option would be to have even fewer "core" federal rules, and adopt only some of the ten draft rules.

The Standing Committee seeks the advice of your Committees on these fundamental options, set out in the "Options Memo." Further, the Standing Committee requests your Committees to examine the "Draft Rules" in light of the special expertise of your Committee. The purpose is not to ask you to redraft these rules yourself, but rather to point out to the Standing Committee where improvements can be made. My task will then be to coordinate the suggestions from all of the Advisory Committees into new drafts and proposals to be considered at the June, 1998 Standing Committee Meeting.

It is expected that certain Advisory Committees will have much less to do than others. In particular, as Study V (1997) of the Working Papers demonstrates, there are almost no attorney conduct cases in the Courts of Appeals, even though the Courts of Appeals have many inconsistent local rules. Apparently, there is no particular problem with attorney conduct at that level. Thus, the Chair and Reporter of the Appellate Advisory Committee have already suggested that they "wait and see" what is decided

for the district and bankruptcy courts, where the problems are much more serious. This is perfectly reasonable.

Bankruptcy proceedings also present a special situation, as Study VI (1997) of the Working Papers demonstrates. There is much to be said for at least considering separate rules governing attorneys in bankruptcy cases, both because of the importance of the Bankruptcy Code, particularly § 327 (11 U.S.C. § 327 (a)), and because bankruptcy cases can present very different issues for public policy and efficiency. See Study VI (June 20, 1997), Working Papers, 294-332. The Bankruptcy Advisory Committee may prefer to focus on developing their own solutions to balkanized local rules in bankruptcy proceedings, rather than comment extensively on the "Draft Rules" included in the memorandum.

The Evidence Advisory Committee also has a relatively specialized frame of reference. Thus, the Standing Committee will be looking to the Civil and Criminal Rules Advisory Committees for the bulk of the assistance. I will be attending all three of these meetings, and will be available to help in any way.

IV. Specific Requests to Individual Committees

In addition to the general advice sought above, there are some specific areas where specialized help would be welcome.

A. Civil Rules Advisory Committee

Should Fed. R. Civ. P. 83 (c) be amended as proposed by the "Draft Rules," or should the Federal Rules of Attorney Conduct be adopted as a new "free standing" set of federal rules? Are there additional changes in the Fed. R. Civ. P. that should be considered in either case? What if the decision is to adopt only Rule 1 of the "Draft Rules," the so-called state "dynamic conformity" approach? Should that one rule be incorporated within the Fed. R. Civ. P., and, if so, where?

B. Criminal Rules Advisory Committee

Should Fed. R. Crim. P. 57 (d) be amended as suggested by Professor Schlueter at pages 2-3 of the "Options Memo"? Does the Committee have comments on "Draft Rule 10," which is based on the most recent discussion draft of a revised ABA Model Rule 4.2, resulting from extensive negotiation between the Conference of Chief Justices and the Department of Justice? Are there other Draft Rules which should get special attention because of their application in criminal matters? Finally, should any new Federal Rules of Attorney Conduct be "free standing," or incorporated within the Fed. R. Civ. P. as an appendix to Fed. R. Civ. P. 83, or as an appendix to Fed. R. Crim. P. 57 (d), or both? What if only Draft Rule 1 is adopted, the so-called state "dynamic conformity" approach?

C. Appellate Rules Advisory Committee

It is understood that this Committee may take a "wait and see" approach on the fundamental policy issues, as discussed above. Nevertheless, it would be appreciated if the proposed new draft of Fed. R. App. P. 46 be reviewed for technical errors and drafting suggestions.

D. Evidence Rules Advisory Committee

I am already indebted to Professor Capra for several most useful suggestions. It is understood that the expertise of this Advisory Committee is not directly involved with these proposals, although suggestions relating to unwanted or unforeseen effects by the Draft Rules on evidentiary privileges or other evidence matters would be gratefully received.

E. Bankruptcy Rules Advisory Committee

As suggested before, the Bankruptcy Committee may wish to consider a separate system of rules governing bankruptcy proceeding. Such a system is discussed at length in Study VI (June 20, 1997), Working Papers, 294-332. The Federal Judicial Center has volunteered to assist by conducting an empirical study of bankruptcy proceedings similar to that completed for district courts generally last June. See Study VII (June, 1997), Working Papers, 335-410.

Two specific questions remain. First, Study VI indicates that most bankruptcy proceedings are, at least technically, governed by the local rules of the relevant district courts, although those rules are often ignored. Should any adoption of a Federal Rules of Attorney Conduct replacing such district court local rules await resolution of the problems in bankruptcy proceedings? Second, bankruptcy policy is currently under review in a number of forums. Will these reviews impact rules governing attorney conduct?

V. Next Steps

At the meeting on June 18-19 in Santa Fe, the Standing Committee will consider all suggestions and criticism from the Advisory Committees. It may then issue the Federal Rules of Attorney Conduct for public comment, which does not imply ultimate approval, or it may amend the Draft Rules and resubmit them to the Advisory Committees for further work. It could also hold the Draft Rules and await a coordinated package of rules governing attorney conduct in bankruptcy procedures, or input from the ABA's "Ethics 2000" Project (chaired by Chief Justice Norman Veasey), or both.

In any case, the Standing Committee is most grateful for all the help it has already received from you and your Committees, and greatly appreciates your further efforts and suggestions.

Appendix II

ABA Tentative
Guidelines for Conduct
with Cover Letter of
March 12, 1998

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March 12, 1998

Karen K. Siegal, Assistant Director
Judicial Conference Executive Secretariat, Room 7400
Thurgood Marshal Federal Judiciary Building
One Columbus Circle
Washington, D.C., 20544

Dear Karen:

After our meeting Monday. I went back to my office to search for additional materials that might be helpful to you in framing your request to chief circuit judges to provide the Judicial Conference with information on their circuit's practices or activities regarding standards of civility among judicial participants.

As I mentioned to you at the meeting, I have collected pamphlets from several courts which explain the court system to prospective litigants. These do not even mention expected conduct or civility in the courts; I thought they might. I therefore am not going to forward these to you, as originally planned.

I do have something, however, that I believe will be of interest to you. The Section of Litigation has developed draft "Guidelines for Conduct" which will be submitted to the ABA House of Delegates in Toronto this summer for adoption. The Guidelines are posted on our website, but I am enclosing them here for your ready reference. I called the Staff Director, Linda Chott (telephone: 312/ 988-5799) who said the Litigation Section would be delighted if you wanted to distribute them or comment on them. They are mentioned on pages 53-54 of *Promoting Professionalism* which was handed out as part of the Agenda Books for the meeting on Monday. The preamble to the proposed *Guidelines* is similar to the preamble to the Seventh Circuit's *Standards,* which also is reprinted on page 54 of the *Professionalism* booklet -- I think I recognize Judge Aspen's influence here!

On behalf of President Shestack in particular, thank you for following up on the suggestion at the meeting that the Judicial Conference give consideration to adopting a model civility code or taking other measures to emphasize the importance of and to enhance civility among participants in the judicial process.

Please feel free to call me if questions arise; even absent questions, let's stay in touch. It was really nice to see you again.

Sincerely,

Denise

Denise A.Cardman

cc. Jerome J. Shestack

GUIDELINES' FOR CONDUCT
OF THE
SECTION OF LITIGATION OF THE AMERICAN BAR ASSOCIATION

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a clien vigorously as lawyers, we will be mmdful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.

A judge's conduct should be characterized at all times by courtesy and patience toward all participants. As judges we owe to all participants in a legal proceeding respect, diligence, punctuality, and protection against unjust and improper criticism or attack.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamentalgoal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

The following Guidelines are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We encourage judges, lawyers and clients to make a mutual and firm coTnmitment to these Guidelines.

We support the principles espoused in the following Guidelines, but under no circumstances should these Guidelines be used as a basis for litigation or for sanctions or penalties.

Lawyers' Duffes to Other Counsel

1. We will practice our profession with a continuing awareness that our role is to zealously advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not oT'ly in court, but also in ad ot~r written and OT. communications.

i These Guiddines are modeled on the Standards for Professional Conduct adopted by the Seventh Circuit Court of Appeals applicable to lawyers practicing within that Circuit.

other counsel.

2. We will not, even when called upon by aclient to do so, abuse or indulge in offensive

conduct directed to other counsel, parties, or witnesses. We will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnessesWe will treat adverse witnesses and parties with fair consideration.

3. We will not encourage or knowingly authorize anyperson under our control to engage in conduct that would be improper if we were to engage in such conduct.

4. We will not, absent good cause, attribute bad motives or improper conduct to

5. We will not lightly seek court sanctions.

6. We will in good faith adhere to all express promises and to agreements with other counsel, whether oral or in writing, and to all agreements implied by the circumstancesrdocal customs.

7. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral umbrstandi~ accurately and completely. The drafter will provide other counsel the opportunity to review the writing. As draftsare exchanged between or among counsel, changes from prior drafts will be identified in the draft or othenvise explicitly brought to other counsel's attention. We will not include in a draft matters to which there has been no agreement without explicitly advising otha counsel in writing of the addition.

8. We will endeavor to confa early with other counsbto assess settlement possibilities. We will not falsely hold out the possibility of settlement to obtain unfair advantage.

9. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.

10. We will not use any form of discovery or discovery scheduling as a means of harassment.

11. Whenever circumstances allow, we will make good faith efforts to resolve by agreement objections before presenting them to the court.

12. We will not time the ffling or service of motions or pleadings in any way that unfairly limits another party's opporh~nity to respond.

13. We will not request an extensionof time solely for the purpose of unjustified delay or to obtain unfair advantage.

14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.

15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel.

16. We will promptly notify other counsel and, if appropriate the court or other persons, when hearings, depositions, meetings, or conferences are to be canceled or postponed.

17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

18. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.

19. We will take depositions only when actually needed. We will not take depositions for the purposes of harassment or other improper purpose.

20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

21. We will not obstruct questioning during a deposition or object to deposition questions unless permitted under applicable law.

22. During depositions we will ask only those questions we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action.

23. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party, or for any other improper purpose.

24. We will respond to document requests reasonably and not strain to interpret requests in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents We will not produce documents in a manner designed to hide or obscure the existence of particular documents, or to accomplish any other improper purpose.

25. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary, and appropriate for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party, or for any other improper purpose.

26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information, or for

any other improper purpose.

27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information, or for any other improper purpose.

28. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.

29. We will not ascribe a position to another counsel that counsel has not taken.

30. Unless permitted or invited by the court, we will not send copies of correspondence between counsel to the court.

31. Nothing contained in these GuideliDes is intended or shall be construed to inhibit vigorous advocacy, including vigorous cross-examination.

Lawyers' Duties to the Court

court.

1. We will speak and write civilly and respectfi,lly in all communications with the

2. We will be punctual and prepared for all court ap~arances so that all hearings, conferences and trials may commence on time; if delayed, we will notify the court and counsel, if possible.

3 . We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

4. We will not engage in any conduct that brings disorder or disruption to the

courtroom. We will advise our clients and witnesses appeaiing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and wimesses from creating disorder or disruption.

5. We will not knowingly misrepresent, mischaracterize, misquote, or mix-cite facts or authorities in any oral or written communication to the court.

6. We will not write letters to the court in connection with a pending action, unless invited or permitted by the court.

7. Before dates for hearings or trials are set, or if that is not feasible, immediately after

such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

8. We will act and speak chilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.

Courts' Duties to Lawyers

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.

2. We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.

3. We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.

4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties, and witnesses.

5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.

6. We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.

7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.

8. We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.

9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

10. We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.

11. We will not adopt procedures that needlessly increase litigation expense.

12. We will bring to lawyers' attention uncivil conduct which we observe.

Judges' Duties to Each Other

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.

2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

3. We will endeavor to work with other judges in an effort to foster a spins of cooperation in our mutual goal of enhancing the administration of justice.

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CIVILITY PLEDGE

As an employer (e.g., law fm, law enforcement agency, regulatory body, governmental agency) of attorneys, we hereby declare that every lawyer who is employed by or associated wit us is expected to abide by the Guidelines for Conduct of the Section of Litigation of the American Bar Association. We recognize that overly aggressive litigation tactics and incivility among lawyers bring disrespect to the legal system and the role of the lawyer, increase the cost of resolving disputes, and do not advance legitimate interests.

- We further pledge to use our best efforts to assure that all our employees recognize the foregoing Guidelines and do not put lawyers or others employed by us in a position that would compromise their ability to meet the Guidelines for Conduct.

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CIVILITY PLEDGE

As a client and retainer of attorneys, the undersigned hereby declares that every lawyer who represents our interests is expected to abide by the Guidelines for Conduct of the Section of Litigation of the American Bar Association. We recognize that overly aggressive litigation tactic and incivility among lawyers bring disrespect to the legal system and the role of the lawyer, increase the cost or resolving disputes, and do not advance legitimate interests.

We further pledge to use our best efforts to assure that all our employees recognize the foregoing Guidelines and do not put lawyers or others retained by us in a position that would compromise their ability to meet the Guidelines for Conduct.

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CIVILIIY PLEDGE

As a judge, I declare that I will endeavor to abide by the Guidelines for Conduct of the Section of Litigation of the American Bar Association. I recognize that overly aggressive litigation tactics and incivility among lawyers (including among judges and between judges and lawyers) bring disrespect to the legal system and the role of the lawyer, increase the cost of resolving disputes, and do not advance legitimate interests.

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Appendix III

CACM Guidelines for Lawyer Neutrals

1998

confidentiality: "A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality." It is best practice to assure that the participants understand the contours of the confidentiality requirements and protections at the outset by having the ADR neutral review the court's rule with them.

8. **The court should evaluate and measure the success of its ADR program, perhaps in conjunction with its advisory group.**

Comment: In many districts with successful ADR programs, the advisory groups established by the CJRA have had important roles in designing, implementing, and evaluating the court's ADR processes. Whether an advisory group is used or not, however, it remains the responsibility of the local court to ensure that its program provides the quality and integrity of service that is commensurate with the court's aspirations and the parties' expectations. Unless such evaluation and measurement are included, the court may remain unaware of areas in need of improvement.

These attributes of healthy and responsive ADR programs are not meant to provide an exclusive list. Courts may have needs and goals that go beyond these principles. The Task Force recommends the consideration of these principles as constituting a bench mark for a court-annexed ADR program.

III. Ethical Principles for ADR Neutrals in Court-Annexed ADR Programs

If courts continue to use practicing as neutrals in court-annexed ADR programs, they must make sure their local rules satisfactorily address the role of the attorney-neutral. Particularly important are rules regarding ethical issues, such as maintaining confidentiality

and revealing conflicts of interest. When adopting such rules, courts should make sure the rules are consistent with the type of ADR program established. For example, while existing rules for judges and lawyers operating in advocacy roles may translate to some extent to adjudicative ADR processes such as arbitration, they cannot properly be applied to non-adjudicative ADR processes such as mediation, where the attorney-neutral acts neither as judge nor advocate but rather as a neutral facilitator in a non-binding process. In designing ethical guidelines appropriate to the type of ADR program adopted, courts should be encouraged to consider each of the following principles.

1. **An attorney-neutral appointed or selected by the court should act fairly, honestly, competently, and impartially.**

   Comment: This is an objective, not subjective, standard. Should the integrity or competency of an attorney-neutral be questioned, the inquiry should be whether an attorney-neutral has acted fairly, honestly, competently, and impartially. Whether this standard has been met should be measured from the point of view of a disinterested, objective observer (such as the judge who administers the ADR program), rather than from the point of view of any particular party.

   The imposition of a subjective appearance standard would unfairly require the neutral to withstand the subjective scrutiny of the interested parties, who, for example, might seek to attack the neutral's impartiality if disappointed by the settlement. As this would undermine the important public interest in achieving binding settlements, there is no intention to impose such a subjective standard under this principle.

2. **An attorney-neutral should disqualify himself or herself if there is a conflict of interest arising from a past or current relationship with a party to the ADR process.**

Comment: Ordinarily, an attorney-neutral cannot perform effectively as a neutral if there is a past or present representational or other business relationship with one of the parties to the dispute, even if that relationship existed only in connection with entirely unrelated matters. However, such conflicts of interest may be waived by the parties, so long as the particulars of the representational or other business relationship are first fully disclosed on a timely basis. Family relationships, and relationships that give rise to an attorney-neutral's having a financial interest in one of the parties or in the outcome of the dispute, or prior representation with regard to the particular dispute to be addressed in the ADR process, cannot be waived.

The Code of Conduct for United States Judges, which incorporates 28 U.S.C. § 455, provides guidance as to the grounds for disqualification of judges. Although the Code of Judicial Conduct is not directly applicable to the attorney-neutral context, it does set out some guiding principles that can be applied if modified to accommodate the different orientation of an attorney-neutral operating in an ADR, as opposed to a public adjudication, context. Keep in mind, however, that § 455 is expressly required as the appropriate standard when evaluating the actions of arbitrators (28 U.S.C. §§ 656(a)(2)).

3. **An attorney-neutral should avoid future conflicts that may arise after the ADR proceeding is complete. Thus, an attorney-neutral should be barred from representing a party to the ADR proceeding with regard to the same or**

substantially related matters, as should his or her law firm, except that no future conflict with regard to substantially related matters will be imputed to his or her law firm after the expiration of one year from completion of the ADR process, provided that the law firm shields the ADR neutral from participating in the substantially related matter in any way.

Comment: Parties to an ADR proceeding have a reasonable expectation that they will not be harmed in the future from an ADR neutral's knowledge about them, especially confidential information gained during the ADR process. Thus, this principle would preclude the ADR neutral from representing any other ADR party in the same or substantially related matters, recognizing the sensitive nature of information, opinions, and strategies learned by the ADR neutral. The same impairment would be imputed to the neutral's law firm in the same case, but it would dissipate with the passage of time, our recommendation being one year, in any substantially related matter. This safe harbor recognizes that it would be far too draconian to automatically preclude the law firm's representation of a prospective client for all time merely because an attorney-neutral in that firm conducted ADR proceedings involving that party in the past, even in a substantially related matter. This provision assumes that the attorney-neutral has observed the duty of confidentiality and that he or she can be screened from any future related matter undertaken by the firm.

A conflict rule that generally disqualifies an entire law firm from representing any party that participates in an ADR proceeding conducted by an attorney in the firm will have severe and adverse effects on court-annexed ADR programs that use active lawyers as neutrals. Finally, because an attorney who serves as a court-appointed ADR

neutral does not thereby undertake the representation of the participants as clients in the practice of law, ethical rules governing future conflicts of interest arising from past representation, such as the ABA Model Rules of Professional Conduct 1.9 and 1.10, do not appear to apply.

4. **Before accepting an ADR assignment, an attorney-neutral should disclose any facts or circumstances that may give rise to an appearance of bias.**

Comment: Once such disclosure is made, the attorney-neutral may proceed with the ADR process if the party or parties against whom the apparent bias would operate waive the potential conflict. The best practice is for the attorney-neutral to disclose the potential conflict in writing and to obtain written waivers from each party before proceeding.

5. **While presiding over an ADR process, an attorney-neutral should refrain from soliciting legal business from, or developing an attorney-client relationship with, a participant in that ongoing ADR process.**

Comment: This provision prohibits the development of a representational attorney-client relationship, or the solicitation of one, during the course of an ADR process. It is not intended to preclude consideration of enlarging an ADR process to include related matters, nor is it intended to prevent the ADR neutral from accepting other ADR assignments involving a participant in an ongoing ADR matter, provided the attorney-neutral discloses such arrangements to all the other participants in the ongoing ADR matter.

6. **An attorney-neutral should protect confidential information obtained by virtue of the ADR process and should not disclose such information to other attorneys**

within his or her law firm or use such information to the advantage of the law firm's clients or to the disadvantage of those providing such information. However, notwithstanding the foregoing, an attorney-neutral may disclose information (a) that is required to be disclosed by operation of law, including the court's local rules on ADR; (b) that he or she is permitted by the parties to disclose; (c) that is related to an ongoing or intended crime or fraud; or (d) that would prove an abuse of the process by a participant or an attorney-neutral.

Comment: This provision requires protection of confidential information learned during ADR processes. For this purpose, information is confidential if it was imparted to the ADR neutral with the expectation that it would not be used outside the ADR process; information otherwise discoverable in the litigation does not become confidential merely because it has been exchanged in the ADR process. This principle also permits disclosure of information that is required to be disclosed by operation of law. This provision accommodates laws such as those requiring the reporting of domestic violence and child abuse.

7. **An attorney-neutral should protect the integrity of both the trial and ADR processes by refraining from communicating with the assigned trial judge concerning the substance of negotiations or any other confidential information learned or obtained by virtue of the ADR process, unless all of the participants agree and jointly ask the attorney-neutral to communicate in a specified way with the assigned trial judge.**

Comment: Courts implementing ADR programs should specifically adopt a written policy forbidding attorney-neutrals from speaking with the assigned trial judge about the substance of confidential negotiations and also prohibiting the assigned trial judge from seeking such information from an attorney-neutral. Docket control should be facilitated by means of the attorney-neutral's report of whether the case settled or not

or through other periodic reporting that does not discuss parties' positions or the merits of the case. Such reports should be submitted to the ADR administrator, judicial ADR liaison, or the court clerk or his or her designee.

Public confidence in both the trial and settlement processes can be undermined if direct communication is permitted between the attorney-neutral and the assigned trial judge regarding the merits of the case or the parties' confidential settlement positions. However, it does no harm to communicate with the trial judge at the joint request of the parties, such as requests for continuances, discovery accommodations, more time to pursue the effort, or administrative closure of the case pending implementation of a settlement agreement.

8. **An attorney-neutral should fully and timely disclose all fee and expense requirements to the prospective participants in the settlement process in accordance with the rules of the program. When an ADR program provides for the attorney-neutral to receive a defined level of compensation for services rendered, the court should require the parties to make explicit the method of compensation and any limits upon compensation. A participant who is unable to afford the cost of ADR should be excused from paying.**

Comment: If the court intends to require a certain level of *pro bono* service in order to participate as an attorney-neutral in a court-annexed ADR program, the level of the *pro bono* commitment should be explicitly defined. Where courts permit neutrals to charge a fee to ADR participants, disputes about ADR fees, though rare, can be prevented through disclosure at the outset of the fee arrangements.

Item 11-14

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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 19, 1998

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Technology Docket Sheet*

The attached chart lists pending and potential technology issues that may implicate the Federal Rules of Practice and Procedure. It includes the status of rule changes presently under consideration by the respective advisory rules committees, which involve technological issues. It also contains potential issues emerging from the experiences of several pilot courts participating in the Electronic Case Files Initiative. Courts began participating in the initiative beginning in 1996. The project is designed to develop a judiciary-wide electronic case files and case file management systems. It is expected to be completed in about three years.

John K. Rabiej

Attachment

TECHNOLOGY DOCKET SHEET
Pending & Potential Rules Issues

ISSUE	DESCRIPTION	STATUS
Commencement of Action:		
Electronic Summons	Electronic preparation, signature, and service of the summons	
Service/Notice by Electronic Means	Proposed amendment to Civil Rule 5 and Civil Rule 77 would permit service/notice by electronic means	CV: Ongoing
Electronic Filing Requirement	Mandatory; Voluntary; Courts Option	
Collection of Fees for Electronic Filing	How does the court collect filing and other fees: Is electronic filing complete prior to payment?	
Proof of Filing	How does the filer prove that something was filed electronically?	
Effect of Electronic Noticing and Service on Computation of Time	Would use of electronic transmission have any effect on the computation of time?	

TECHNOLOGY DOCKET SHEET
Pending & Potential Rules Issues

ISSUE	DESCRIPTION	STATUS
Pleadings; Motions:		
Motions Served Electronically	Permit application, motion, or response to be served electronically	BK: Has tentatively approved proposed amendments to Rules 9013 & 9014 and is seeking permission to publish for comment
Electronic Signature	What constitutes a "signature" of electronic documents? There are many different protocols for securing electronic documents.	
Pretrial Conference	Should the "use of technology" be added to the list of subjects to be considered in Rule 16(c) or is Rule 16(c)(16) sufficient?	CV: See Rule 16(c)
Discovery:		
Electronic discovery		CV: Ongoing — Subcmte on Technology to study electronic discovery, including searches, quantity issues, and ease of movement, deletion, and manipulation
Filing of Sealed Documents	Can sealed documents be filed electronically; can sealed documents filed electronically be safeguarded?	

TECHNOLOGY DOCKET SHEET
Pending & Potential Rules Issues

ISSUE	DESCRIPTION	STATUS
Trials:		
Electronic Presentation of Evidence	Accommodate changes in the way evidence is presented?	EV: Ongoing — Cmte will consider amendments necessary to accommodate technological changes in the way evidence is presented (See ECP list below)
Video Conferencing of Witness Testimony	Taking testimony from a remote location	CRIM: Ongoing; proposed amendment to Rule 26 would permit the taking of testimony from a remote location
Electronic Subpoenas	Should subpoenas be issued and served electronically?	CV: See Rule 45
Proof of Record	What effect, if any, will the use of technology by other agencies have upon proof of record requirements?	CV: See Rule 44
Court Orders:		
Electronic Issuance of Court Orders	Are court orders to be filed electronically?; Effect of court order without original signature?	
Uniform Plan for Publication of Opinions	Development of uniform rules for publication and dissemination of opinions, including electronic dissemination	AP: Long-term study; FJC submitted preliminary report

TECHNOLOGY DOCKET SHEET
Pending & Potential Rules Issues

ISSUE	DESCRIPTION	STATUS
Clerks: Records, Access, Equipment		
Record Retention	Does Civil Rule 79 need to be amended to account for new document storage options?	CV: See Rule 79
Public Access to Electronically Filed Documents	How does public, without PC's, access electronic documents?; Is cross-case searching available for non-court personnel?	
Equipment Failure, Incompatible Electronic Equipment	Who bears responsibility for the inability to file because of technical problems?; What constitutes technical problems?; How to deal with questions of document format (incompatibility, timeliness, storage, archiving, etc.)	
Appeals:		
Briefs on Diskette	Submission of digitally readable copy of brief	AP: Proposed amendment to Rule 31 has been assigned medium priority
Record on Appeal	What constitutes the record on appeal if appellate court does not have electronic filing capabilities?	AP: See Rule 10

TECHNOLOGY DOCKET SHEET
Related Judicial Conference Committee Projects

ISSUE	DESCRIPTION	STATUS
Public comments received via Internet	Comments on proposed rules amendments electronically sent via the Internet	SRC: Advisory rules committees agreed to a two-year pilot project
Local Rules Project	An initiative to place all local district court and bankruptcy court rules on the J-Net	SRC: Potential technology issues are indeterminate
Electronic Courtroom Project	A study of courtroom technologies, including video conferencing, video evidence presentation, etc.	CAT: Under consideration. The JCUS will likely issue a report on ECP this summer.
Electronic Case Files (ECF) Pilot	An experiment to test electronic filing in selected pilot courts.	Underway. The pilot project will generate possible solutions to many of the issues listed above